No. 481

# In the Supreme Court of the United States

OCTOBER TERM, 1938

ROCHESTER TELEPHONE CORPORATION, APPELLANT

*v.*

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES

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## BRIEF FOR APPELLEES

### OPINION BELOW

The opinion of the United States District Court for the Western District of New York (R. 431) is reported in 23 F. Supp. 634.

### JURISDICTION

The decree of the District Court was entered on October 21, 1938 (R. 449). Petition for appeal was filed November 9, 1938 (R. 451), and was allowed the same day (R. 454).

Jurisdiction is conferred on this Court by Section 402 (a) of the Act of June 19, 1934, c. 652, 48

Stat. 1093 (U. S. C., Title 47, Section 402 (a)), and by the Act of October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., Title 28, Section 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Section 345).

## QUESTIONS PRESENTED

1. Did the specially constituted district court have jurisdiction to review the determination of the Federal Communications Commission that the Rochester Telephone Corporation is controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934?

2. Should the determination of the Federal Communications Commission that the Rochester Telephone Corporation is controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934 be sustained if it is supported by substantial evidence?

3. Is the Rochester Telephone Corporation controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934?

## STATUTES INVOLVED

The sections of the Communications Act of 1934 (48 Stat. 1064; 47 U. S. C. A. § 151) primarily involved in this case follow:

> Sec. 2 (a) The provisions of this Act shall apply to all interstate and foreign

communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . .

(b) Subject to the provisions of section 310, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

The other pertinent provisions of the Communications Act of 1934 are set forth in the appendix to this brief, *infra* pages 78 to 89.

## STATEMENT

This is an appeal from a decree of a specially constituted three-judge district court, dismissing a bill in equity brought to set aside and enjoin an

order of the Federal Communications Commission issued on November 18, 1936, which classified the Rochester Telephone Corporation, insofar as it engages in interstate and foreign communication, as a carrier subject to all of the common carrier provisions of the Communications Act of 1934, and, as such, subject to all general orders of the Commission applicable to wire telephone carriers whose annual gross operating revenues exceed $50,000 (R. 430).

At various times between July 20, 1934, and September 13, 1934, the Telephone Division of the Federal Communications Commission, pursuant to its authority under the Act, promulgated certain general orders, numbered 1, 2, 3, 5, 6a and 9, which in substance required telephone carriers subject to its jurisdiction to report to the Commission detailed information concerning their operations, corporate structure, and management (R. 20, 21, 23, 24, 25, 26, 28).

Upon the failure of appellant, Rochester Telephone Corporation, to respond to these orders, the Telephone Division of the Commission issued an order on October 14, 1935, which it amended on November 13, 1935, requiring appellant to show cause why it should not be required to file responses to the General Orders enumerated above (R. 5-7). Appellant filed its verified answer to the amended order and requested a determination of its status under Section 2 (b) (2) of the Act exempting

local telephone carriers not owned or controlled by or controlling a connecting telephone carrier, and the issuance of an order declaring that it was not subject to the jurisdiction of the Commission, except as to the requirements of Sections 201–205 of the Act (R. 2).

On January 8 and 16, 1936, hearings were held before an examiner of the Commission for the purpose of taking evidence to determine whether appellant was controlled by the New York Telephone Company with whom it connects (R. 30–252). Appellant filed a special appearance denying the jurisdiction of the Commission and contending that the burden of proof was on the Commission to show that it did not come within the statutory exception (R. 31). The examiner overruled the contention of appellant regarding the burden of proof and proceeded to a hearing of the controversy (R. 33). After an extensive hearing, the examiner filed his report with the Commission recommending that it find that appellant was under the direct or indirect control of the New York Telephone Company (R. 3). The matter was argued orally and briefs were filed by appellant taking exceptions to the recommendations of the examiner (R. 3). On September 28, 1936, the matter was submitted to the Telephone Division of the Commission on the question as to whether the recommendation of the examiner should be adopted, and on November 18, 1936, the Commission (through its

Telephone Division) filed a decision finding that appellant is under the control of the New York Telephone Company and hence subject to the jurisdiction of the Commission (R. 411–430). On the same day the Commission (through its Telephone Division) issued an order classifying appellant as a wire telephone carrier subject to all the common carrier provisions of the Communications Act of 1934 and to all general orders of the Commission applicable to such wire telephone carriers (R. 430). Appellant filed a petition for rehearing before the entire Commission (R. 3). On January 27, 1937, this petition for rehearing was denied by the full Commission (R. 4).

On March 18, 1937 appellant filed a bill in equity in the United States District Court for the Western District of New York, seeking to enjoin and set aside the Commission's determination (R. 1–5). The bill alleged, among other things, that the appellant was engaged in interstate and foreign communication solely through physical connection with the facilities of the New York Telephone Company and that it was not directly or indirectly controlled by that Company (R. 1); and that the Commission erred as a matter of law in determining that appellant was directly or indirectly controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Act since the facts established before the Commission by undisputed and uncontradicted evidence demonstrated that no

such control existed (R. 4). The bill further alleged that if, upon the facts established before the Commission by undisputed and uncontradicted evidence, appellant is, under the terms of the Act, subject to the common carrier provisions of said Act, then the Act is unconstitutional since it exceeds the powers of Congress and violates the provisions of the Constitution (R. 4).

Appellant offered no new evidence in the trial of the cause in the court below. The specially constituted three-judge District Court dismissed the bill in equity upon the record made before the Commission. *Rochester Telephone Corporation* v. *United States, et al.*, 23 F. Supp. 634. In a unanimous opinion the court, after carefully reviewing the evidence before the Commission, held: "The plan providing for the organization and incorporation, election of directors and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company." and that hence "The petitioner does not come within the exemption of the statute as set forth in § 2 (b) (2)." 23 F. Supp. 634 at 638. The court filed, pursuant to equity rule 70½, the findings of fact and conclusions of law upon which its decision was based (R. 438–449).

## SUMMARY OF ARGUMENT

The determination of the Federal Communications Commission classifying appellant as subject to the jurisdiction of the Commission and the gen-

eral orders applicable to such wire telephone carriers is not an order which is reviewable under the terms of the Urgent Deficiencies Act of 1913. The determination of the Commission neither commands nor directs appellant to do or to refrain from doing anything. *Shannahan et al* v. *United States*, 303 U. S. 596, 599. With respect to the instant order, the Commission could not have instituted a proceeding to enforce it and consequently the court below had no jurisdiction to set aside such an order. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. The order of the Commission which appellant seeks to review in this case does not constitute the basis of the actual controversy. That such an order is non-reviewable is demonstrated by the opinion of this Court in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412.

The court below and the Federal Communications Commission correctly interpreted the exemption provision of Section 2 (b) (2) of the Communications Act in holding that, upon the evidence presented in the course of its hearings, appellant was controlled by the New York Telephone Company. The congressional reports considering the legislative antecedents of the Communications Act of 1934 clearly demonstrate that Congress intended the term "control" to embrace every form of control, actual or legal, direct or indirect, negative or affirmative, and to include also the power to control regardless of whether that power was being affirma-

tively exercised at a particular time when the issue was raised before the administrative body (House Report 1850, 73rd Cong., 2nd Sess., pp. 4 and 5).

The evidence in the record before the Federal Communications Commission clearly shows that the New York Telephone Company controls appellant. The New York Telephone Company owns all of the second preferred stock (48,140 shares) of appellant, which possesses equal voting rights with the common stock except in the selection of the members of the board of directors and in amending the By-Laws. The New York Telephone Company also owns 33½ per cent (335 shares) of the common stock of appellant which possesses full voting rights except that on matters of major importance the vote or consent of 80 per cent of the holders of the common stock is necessary. By virtue of this veto power the New York Telephone Company is in a position to check or control the action of the majority of the common stock which is deposited in a voting trust. By means of cumulative voting provisions in the certificate of incorporation the New York Telephone Company is assured of electing five of the fifteen members of the board of directors of appellant and two of the five members of the executive committee of appellant. Furthermore, the history of appellant and of the voting trust supports the conclusion that appellant is controlled by the New York Telephone Company.

In view of these circumstances the court below properly concluded that the New York Telephone Company possessed the power to control appellant.

The opinion of the court below and its elaborate findings of fact and conclusions of law filed with the decree clearly indicate that the court weighed and independently considered the evidence before the Commission. The court below, in the exercise of its independent judgment on the facts, properly accorded some weight to the determination of the Commission. This was not error. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53; *Heath* v. *Wallace,* 138 U. S. 573, 583. But even if the court below had not independently weighed the evidence, this would not have been error. The findings of administrative agencies, in the course of regularly conducted hearings, are binding upon the reviewing court if supported by substantial evidence and not arbitrary or capricious. *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 470; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665; *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287; *Shields* v. *Utah-Idaho Central R. R. Co.,* 305 U. S. —, —. The authority of the Commission pursuant to Sections 403 and 404 of the Communications Act brings the determination of the Commission in this case within the rule laid down by this Court in *Shields* v. *Utah-Idaho Central R. R. Co.*

## ARGUMENT

### I

### THE COURT BELOW WAS WITHOUT JURISDICTION TO REVIEW THE DETERMINATION OF THE COMMISSION

This suit was heard by a statutory three-judge district court. The jurisdiction of such a court to review orders of the Federal Communications Commission is derived primarily from section 402 (a) of the Communications Act of 1934 which provides in part:

> The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act * * * and such suits are hereby authorized to be brought as provided in that Act.

The effect of the foregoing provision is to make applicable the provisions of the Urgent Deficiencies Act of October 22, 1913, to suits brought for the purpose of reviewing orders of the Federal Communications Commission. In view of recent decisions of this Court appellees submit that the order involved in the instant case is not one which may be reviewed by a court of three judges convened pursuant to the Urgent Deficiencies Act. *United States* v. *Griffin et al.*, 303 U. S. 226; *Shannahan et al.* v. *United States*, 303 U. S. 596; *Federal*

*Power Commission* v. *Metropolitan Edison Co. et al.*, 304 U. S. 375.[1]

In its Jurisdictional Statement to this Court appellant sets forth the following order which it asserts is the subject of review:

> Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000.

In its brief appellant again sets forth the same order and states that it is this determination of the Commission which it seeks to have reviewed (Appellant's Brief, p. 3).

It is true that the record contains certain general orders of the Telephone Division of the Com-

[1] Objection to the jurisdiction of the court was not made below. Neither was any statement opposing jurisdiction filed with this Court. It appears, however, that the limited jurisdiction of a statutory three-judge district court cannot be waived or enlarged by the consent of the parties. See *Stratton* v. *St. Louis Southwestern R. R. Co.*, 282 U. S. 10, 18; *United States* v. *Corrick*, 298 U. S. 435, 440. This Court may raise the question of the lower court's jurisdiction of the subject matter on its own motion. *Stratton* v. *St. Louis Southwestern R. R. Co.*, 282 U. S. 10, 13; and see *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63; *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

mission designated as orders 1, 2, 3, 5, 6a, and 9 which require wire telephone carriers classified as the Commission has classified appellant to submit detailed information regarding their organization and operations. Broadly interpreted, the bill of complaint might be construed as attacking those general orders. The appellant did not, however, urge the court below to set aside the general orders as improper or unlawful exercises of administrative discretion, nor did the appellant introduce, either before the Commission or in the court below, any evidence relating to the validity of the general orders. It appears from the Jurisdictional Statement and from the arguments urged by the appellant both here and below that appellant's quarrel is not with the general orders but with the Commission's determination that appellant is subject to its jurisdiction. Appellant seems to concede at least by implication that if it is subject to the Commission's jurisdiction and to the general orders, those orders are proper and lawful exercises of administrative judgment.

The order which this Court is asked to consider has two aspects; *First,* it classifies appellant as a wire telephone carrier subject to certain provisions of the Communications Act of 1934, and, *second,* it notifies appellant that it is subject to all orders of the Telephone Division applicable to wire telephone carriers, whose gross annual operating income exceeds $50,000 (R. 430). If the second portion of the order has any significance it merely

serves to notify appellant that it is classed as subject to the general orders. "The decision neither commands nor directs anything to be done" (*Shannahan et al.* v. *United States*, 303 U. S. 596, 599). "It was merely preparation for possible action in some proceeding which may be instituted in the future" (*United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299, 310).

This Court has held on many occasions that a determination which does not require a party to do or to refrain from doing anything is not such an order as is reviewable under the terms of the Urgent Deficiencies Act. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; 414; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469, 475–477; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 238; *United States* v. *Corrick*, 298 U. S. 435, 438; *Shannahan et al.* v. *United States*, *supra*.

One of the reasons assigned by this Court which prevents the review of negative orders is the correlation of the provisions of the Urgent Deficiencies Act regarding suits brought to enforce orders of the Commission and those brought to set aside such orders. It was held in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, that district courts possessing jurisdiction to set aside or annul orders of the Commission were limited to reviewing orders

which the Commission could enforce under the terms of the Urgent Deficiencies Act. Applying that test to the present controversy, it is apparent that the Federal Communications Commission could not institute a proceeding to enforce the specific order classifying appellant as a wire telephone carrier subject to its jurisdiction. To require the submission of information which the Commission designated in the general orders previously mentioned, it would be necessary for the Commission to base its enforcement suit upon those general orders rather than upon the specific order of classification.

In this respect we are unable to perceive any valid distinction between the order of the Commission involved in this controversy and the order of the Interstate Commerce Commission which this Court held in *Shannahan et al.* v. *United States*, 303 U. S. 596, to be nonreviewable under the terms of the Urgent Deficiencies Act. In the latter case the Interstate Commerce Commission issued an order finding that a certain railroad was not within the terms of the exemption provision of the Railway Labor Act and was "therefore subject to the provisions of that Act" (303 U. S. 596 at 598). The fact that the order involved in *Shannahan et al.* v. *United States, supra*, determined that the railroad carrier was subject to the provisions of the Railway Labor Act and that the order involved in this case determined that the telephone carrier

was subject to all general orders of the Telephone Division of the Commission is immaterial insofar as the jurisdiction of the court below is concerned. In neither case is the party in question ordered to do or refrain from doing anything. Consequently it would be impossible for a court to command obedience to the order because there is nothing required which can be obeyed or disobeyed. If in the instant case appellant is under any compulsion, that compulsion flows from the provisions of the statute and from the general orders which appellant does not seek to have reviewed. Since the order here involved is not enforceable it is not subject to review under the provisions of the Urgent Deficiencies Act.

Another reason assigned by this Court for its refusal to permit the review of so-called "negative orders" is that the validity of the order which is challenged does not constitute the basis of the actual controversy. The decision of this Court in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, clearly demonstrates this situation. The Panama Canal Act prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; conferred upon the Commission jurisdiction to determine the possibility of competition; and authorized the Commission to grant an extension of time to make

the necessary adjustments if it found a possibility of competition. The Lehigh Valley Railroad filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the Act and for an extension of time. The Commission held that the Railroad competed with its boat line and dismissed the petition. This Court held that the risk to which the Railroad was subjected in continuing operation did not come from the order of the Commission which the carrier sought to review but from the statute which contained the prohibition and provided a penalty. It was therefore concluded that the determination of the Interstate Commerce Commission was not reviewable under the terms of the Urgent Deficiencies Act.

The same reasoning is applicable to the instant case. Although appellant seeks to determine the validity of the specific order classifying it as a wire telephone carrier subject to the Act, the actual controversy centers around the desire of appellant to be relieved of the duty to supply certain specified information which is imposed by the general orders of the Telephone Division of the Commission. The only penalties which appellant fears or is subject to are those imposed for failure to comply with the general orders. In short, the risk to which appellant is subjected arises from the Act and from the general orders which, as has been pointed out, are not under attack in this proceeding.

A practical application of this proposition to the instant case is readily apparent. If it be assumed for the purpose of argument only, that the decree below becomes final and thereafter appellant refuses to furnish the specified information, appellant would not be guilty of violating the decree of the court below because that decree only requires appellant to obey the order classifying it as a wire telephone carrier subject to the general orders. In order to compel appellant to furnish the information, it would be necessary for the Commission to resort to enforcement proceedings based upon the general orders. Similarly, if this Court should do nothing more than set aside the decree of the court below, the Commission would still be entitled to seek enforcement of its general orders by injunction under Section 401 of the Act upon the development of a new record establishing the control of appellant by the New York Telephone Company.

In its brief appellant contends that the Commission had no power or jurisdiction to determine the issue of exemption (Appellant's Brief, p. 17). We submit that there is no merit in this contention (see, *infra*, pp. 60–65). However assuming, *arguendo*, that appellant is correct in this contention, the decision of this Court in *Piedmont Northern Ry.* v. *United States*, 280 U. S. 469, is directly in point. In that case the Railway, considering itself not subject to the provisions of the Interstate Commerce Act, decided to extend its lines to connect with

several steam railroads. At the suggestion of the Commission, the Railway filed an application for a certificate of public convenience and necessity as required of carriers subject to the Act. The Commission took jurisdiction and denied the application after a hearing. The Railway brought suit under the Urgent Deficiencies Act insisting that it was exempt from the jurisdiction of the Commission and that the order should be set aside for that reason. In answer to this contention of the Railway, this Court said (p. 477):

> The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the Railway's application, then concededly the order is not subject to attack. *If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans.* What plaintiffs [sic] are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. [Italics supplied.]

The appellees submit that under the decisions of this Court the order involved in this litigation is not one which may be enjoined, set aside, or annulled by a statutory three-judge court convened pursuant to the Urgent Deficiencies Act.

## II

### THE FEDERAL COMMUNICATIONS COMMISSION PROPERLY INTERPRETED THE EXEMPTION PROVISION OF SECTION 2 (b) (2) OF THE ACT

Section 2 (a) of the Communications Act of 1934 provides that all carriers engaged in interstate and foreign communication by wire or radio shall be subject to the provisions of the Act. Section 2 (b) (2) exempts such carriers from the jurisdiction of the Commission if they are engaged in such interstate and foreign communication "solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled" by such carrier. Appellant conceded in the court below that it was engaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company, and that the latter company is a carrier subject to the jurisdiction of the Commission (R. 1). Appellant denies that it is either directly or indirectly controlled by the New York Telephone Company and asserts that it therefore falls within the terms of the exemption clause of Section 2 (b) (2) of the Act.

The Commission, after extended hearings and after careful analysis of the statutory language, concluded that the appellant is controlled by the New York Telephone Company. The court below not only decided that the Commission's determination was supported by substantial evidence but in

its findings of fact and conclusions of law the court in effect adopted the Commission's finding as its own.[2]

In rejecting the appellant's contentions, both the Commission and the court below took the view that a carrier was subject to control within the meaning of Section 2 (b) (2) if there existed a power to exert such control and that it was not necessary to show concrete instances of the exertion of that control in order to deny a carrier the benefits of the exemption clause. The appellees submit that this construction of the statute is correct.

It is a well established principle of statutory construction that provisos and exemptions, being intended to exclude something which otherwise would be within the scope of the general language of the enacting clause, must be strictly construed and limited to the objects fairly within their terms. *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 10. In order to construe the language of Section 2 (b) (2) it is necessary to examine and understand the meaning of the term "control" as used by Congress in the exemption clause. A guide to the meaning of the term "control" is furnished by the context of the Act as a whole and by the relation of the specific provision here in question to the broad communications policy laid down by Congress. According to the provisions of Section 1 of the Act, Congress under-

[2] See Paragraph XIX of the Findings of Fact (R. 446) and Paragraph VI of the Conclusions of Law (R. 448).

took "to make available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *" When the phrase under consideration is read in the light of this congressional policy it is clear that Congress intended that the word "control," as used in the exemption section, should be given a broad significance and that its scope should not be limited by any narrow and technical construction.

A consideration of the legislative history of the statute shows that the Commission and the court below have interpreted the exemption clause of Section 2 (b) (2) so as to give proper effect not only to the language used but also to the intention of Congress in the use of the term "control."[3] The

[3] When the meaning of legislation is doubtful or obscure, to ascertain the true intent of the legislature, resort may be had to reports of congressional committees which have considered the measure (*McLean* v. *United States*, 226 U. S. 374, 380; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278). It has also been held by this Court that reference to expositions concerning the bill on the floor of Congress by those in charge of or sponsoring the legislation is permissible. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke et al.*, 300 U. S. 440, 463. In situations similar to the one before this Court it has been held that resort may be had to the congressional debates in order to show common agreement as to the purpose of the statute. *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

congressional reports prior to the passage of the Communications Act of 1934 make it abundantly clear that the exemption clause referring to wire carriers "not directly or indirectly controlled by" a connecting carrier was purposely not defined in order that the Commission would not be unduly hampered in its administration of the Act. A reference to the legislative antecedents of the Communications Act of 1934, a method of interpretation which was permitted by this Court in *United States* v. *Pfitsch*, 256 U. S. 547, 551, and *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 155, clearly sustains this position.

Both H. R. 8301 and S. 2910 (73rd Cong., 2d Sess.), the legislative antecedents of the Communications Act of 1934 in the House and Senate, respectively, contained a section in which the terms "parent," "subsidiary," and "affiliate" were defined. By this device the original bills attempted to segregate by definition the particular communication companies which were to come within the purview of the Act. These definitions were as follows:

> SEC. 3 (j). "Parent" means any person or group of persons controlling one or more corporations and/or the operations or management thereof, whether by ownership or control of stock, or by interlocking directorates, or otherwise. The ownership or control by any such person or group of persons of 15 per centum or more of the stock of any corporation shall be prima

facie evidence of the control of such corporation and/or its operations or management by such person or group be deemed to be a "parent." A corporation to which any such person or group of persons bears the relationship of parent shall be deemed to be a "subsidiary" of such person or group of persons.

(k) Two or more persons shall be deemed to be affiliated if they are members of a group, composed of a parent and its subsidiary or subsidiaries, or a parent, its subsidiary or subsidiaries, and other corporations, of which each member except the parent is a subsidiary of some other member.[4]

During the hearings on these bills it was pointed out by several witnesses that considerable confusion would result from the use of such terms as "parent," "subsidiary," "affiliate" and that therefore they should either be eliminated from the bills or less controversial terms should be used in their place.[5] After consideration of these objections, the terms "parent," "subsidiary," "affiliate" were completely eliminated from both bills. One of the principal reasons for this change is explained in the Report of the Committee on Interstate and Foreign Commerce of the House of Rep-

[4] Hearings before the Committee on Interstate Commerce, U. S. Senate, 73d Cong., 2d Sess., on S. 2910, p. 2.

[5] *Ibid.*, pages 96, 139; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2nd Sess., on H. R. 8301, pages 240–241.

resentatives. That report pointed out that the specified standard of 15 per cent stock ownership in a corporation might be inadequate as a measure of effective control. In place of this standard the Committee inserted the exemption clause which the Commission has construed in this case. The full explanation of this amendment to the original bills is contained in the Report of the House Committee in the following language:

> The bill upon which this committee held hearings (H. R. 8301), contained a definition of the terms "parent," "subsidiary," and "affiliated" for the purposes of those provisions of the bill which applied to parents and subsidiaries of common carriers subject to the act and persons affiliated with such carriers. The Senate bill and the amendment reported herewith both leave out these definitions since the persons intended to be covered are referred to in the Senate bill and the amendment as persons "directly or indirectly controlling or controlled by, or under direct or indirect common control with" any carrier subject to the act. It is believed that this method of referring to such persons is preferable to attempting to cover them through the use of the terms "parent," "subsidiary," and "affiliated." Many difficulties are involved in attempting to define such terms. It is believed that a more satisfactory result will be reached by referring to such persons as in the Senate bill and amendment. *No attempt is made to define "con-*

> *trol," since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control.* It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors. [Italics supplied.][4]

In view of this legislative history, it is submitted that there are three factors which should be considered in construing the exemption clause as applied to the appellant. First, Congress did not feel that the fifteen per cent stock-ownership standard was a sufficient criterion by which to measure the element of corporate control. Second, Congress did not intend to expressly define the word "control" as used in the exemption clause since to do so would be to "limit the meaning of the term in an unfortunate manner." It is evident that Congress properly avoided detailed rules and definitions in order to give the Commission a limited discretion as to those companies which should come within the purview

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[4] House Report 1850, 73rd Cong., 2nd Sess., pp. 4–5.

of the Act. Third. Congress intended to include within the meaning of the term "control" both "actual control as well as what has been called legally enforceable control."

It is a reasonable implication from the foregoing analysis that Congress intended to leave the definition and application of the term "control" to the *sound discretion of the Commission according to the particular facts and circumstances as disclosed in each case coming before that body in which the issue was raised.* For this reason, if for no other, appellees contend that the previous administrative or judicial interpretation of similar terms in other congressional acts having no relation to the Communications Act should not be permitted to alter or modify the apparent intention of Congress in the construction of the latter Act. In its brief (pp. 25–26) appellant cites several decisions of the Interstate Commerce Commission interpreting the term "control" as used in Section 5 (2) of the Transportation Act of 1920 and numerous decisions of this Court and the lower courts construing the concept of corporate control with respect to various legal questions. It is submitted that the earlier construction of these acts by either administrative bodies or the courts should not be conclusive as to the intention of Congress when the term was used in a subsequent Act having no relation to the previous legislative policies.

In the House Report previously mentioned, the Committee referred to the railroad provisions of

the Interstate Commerce Act and to the fact that an attempt had "been made to preserve the value of court and commission interpretation of the Act, *but at the same time modifying the provisions so as to provide adequately for the regulation of communications' carriers.*"[7] This observation is of particular significance when it is realized that the Committee, during its consideration of H. R. 8301, had before it the Splawn Report on Communication Companies.[8] The Splawn Report was emphatic in its conclusions as to the inadequacy of the existing provisions of the Interstate Commerce Act to control or regulate the holding company situation and was likewise emphatic in its warning that "A bill regulating communications in interstate commerce will fall far short of being effective unless it first restrict the use of the holding company to what is absolutely essential and necessary and second unless the regulation is extended to the holding company in like manner as to the operating company."[9] It was doubtless in part because of this observation regarding holding companies that the Communications Act restricted the exemption clause to intrastate carriers *not* controlling or controlled by connecting wire carriers. It may also be assumed that it was for similar reasons that the definition and application of the term "control" to

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[7] House Report 1850, 73rd Cong., 2nd Sess., p. 4 (Italics supplied).

[8] House Report 1273, 73rd Cong., 2nd Sess.

[9] House Report 1273, 73rd Cong., 2nd Sess., pp. xxx, xxx.

particular companies was left to the sound discretion of the Commission.

Appellant contended in the court below that the controlling company must not only have the power to control but must also affirmatively exercise that power in acts of dictation and direction of the company's affairs. In opposition to this contention, appellees relied upon the Report of the House Committee which has been quoted above (p. 25, *supra*) and which indicates that Congress intended "to include actual as well as what has been called *legally enforceable control.*"[19] Nowhere throughout the entire House Report is there any indication that the power to control, that is, legally enforceable control, is not sufficient in itself to come within the term "control" as used in Section 2 (b) (2).

Furthermore, there is no evidence whatsoever that Congress intended to exclude carriers from the jurisdiction of the Commission which were admittedly under a legally enforceable control but not actually controlled at any particular time when an investigation was being conducted. Any other interpretation of Section 2 (b) (2) would create grave problems in the administration of the exemption clause. Each intrastate carrier engaging in interstate communication through connecting facilities of a controlled or controlling carrier would have to be under constant investigation by

[19] House Report 1850, 73rd Cong., 2nd Sess., pp. 4-5. [Italics supplied.]

the Commission in order to ascertain if the power to control was being affirmatively exercised by either carrier.[11] Even assuming that such constant investigation were practicable, in many instances the situation would change before or even after the Commission had attempted to exercise its jurisdiction over such carriers. Such an interpretation of the Communications Act would run counter to the manifest intent of Congress.

The House Report previously referred to assumes without question that the bare existence of a legally enforceable control or the power to control would be sufficient to come within the meaning of the statutory language. In addition to this, Con-

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[11] *Cf.* Bonbright & Means, *The Holding Company* (1932) 8:

"Most legal writers, for example, would give the name 'holding company' only to a company which actually exercises control of one or more other companies. A minority of writers, however, would make the ability to control, rather than its actual exercise, the deciding factor. Having in mind the practical necessities of legal drafting, we prefer this second form of definition. It is much easier for an administrative or judicial body to determine when a company has the ability to control another company than to determine when it is actually making use of its power. Often, moreover, a company which possesses the power to control another company will refrain from exercising it for a considerable period of time, and will bring it into play only when some special occasion demands its use. In a case like this the mere existence of the power to control, even if it is being held in abeyance is a matter of public interest, and may be sufficient to justify whatever supervision may properly be imposed upon an active holding company."

gress intended the general concept of control to include actual control, either directly or indirectly, by any means or device whatsoever. This affirmative exercise of control which Congress considered to be a possible element of the general concept of control should be considered as *a separate and distinct factor* evidencing a degree of control rather than *an essential or necessary attribute* of the term as used by Congress in the exemption clause.

One other point in this connection should be emphasized. When Congress included actual as well as legally enforceable control within the concept of the term "control" it did so in full recognition of the fact that there were "many ways in which actual control may be exerted" such as "stock ownership, leasing, contract, and agency." Congress was also aware that such control could be exerted "through ownership of a small percentage of the voting stock of a corporation either by ownership of such stock alone or through such ownership in combination with other factors."[12] Appellant has apparently ignored these possibilities of actual control by constantly referring to "the actual power to select the board of directors (or its majority)," as the sole criterion of corporate control (Appellant's Brief, pp. 21, 34). To insist upon this criterion to the exclusion of all others is to ignore the realities of financial and corporate

[12] House Report 1850, 73rd Cong., 2nd Sess., p. 5.
[13] *Ibid.*

practices. Congress intended the term "control" to embrace *every form of control*, actual or legal, direct or indirect, negative or affirmative, and to include also the power to control regardless of whether that power was being affirmatively exercised at a particular time when the issue is raised before the administrative body."[14]

In its brief (pp. 26–27) appellant intimates that both the Commission and the court below relied on the fact "that there is a possibility that New York Telephone Company may some time control appellant." This is a circumstance which the Commission and the court below might properly take into consideration in reaching a conclusion, but appellant errs if it assumes that this was the sole basis of the Commission's determination or

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[14] In a recent case before this Court, Mr. Justice Stone took occasion to consider the various forms by which corporate control may be exercised. In delivering the opinion of the Court in *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 307, 308, it was said:

"We have not said, nor do we perceive any ground for saying, that the constitution requires such an inquiry to be limited to those cases where common control of two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, * * * *there are other methods of control of a corporation than through such ownership. Common management of corporations through officers and directors, or common ownership of a substantial amount, though less than a majority of their stock*, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry." [Italics supplied.]

the District Court's decision, or that either the Commission or the court below confused the possibility of control with legal power to control. Both the Commission and the court below did more than conclude that there is a possibility that the New York Telephone Company might at some time in the future control appellant; both concluded that there exists at the present time a legal power on the part of the New York Telephone Company to control the appellant and that as a result the appellant falls outside of the terms of Section 2 (b) (2).

## III

### THE APPELLANT IS CONTROLLED BY THE NEW YORK TELEPHONE COMPANY WITHIN THE MEANING OF SECTION 2 (b) (2) OF THE ACT

#### A. APPELLANT'S CORPORATE STRUCTURE CONFERS LEGAL POWER TO CONTROL UPON THE NEW YORK TELEPHONE COMPANY

The appellant, a New York corporation, is capitalized at $12,000,000 divided into 120,000 shares of capital stock, each with a par value of $100 (Ex. 10, R. 55, 351–364; Ex. 15, R. 62, 376–384). Of the 120,000 shares of capital stock authorized, 71,966 shares with a total par value of $7,196,600 have been issued and are now outstanding (Ex. 16, R. 117, 394). The shares of stock now issued and outstanding are classified and held as follows (Ex. 16, R. 117, 394):

1,000 shares of common stock ($100,000 total par value), of which 665 shares are de-

posited under a voting trust agreement, and 335 shares are owned outright by the New York Telephone Company.

22,826 shares of first preferred stock ($2,282,600 total par value), which are owned by the general public.

48,140 shares of second preferred stock ($4,814,000 total par value), all of which is owned by the New York Telephone Company.

In addition to this stock the appellant has issued bonds with a face value of $6,238,000 which are largely held by the public (R. 68).

The first preferred stock has no voting rights whatsoever. The voting rights of the shareholders are concentrated in the hands of those who own the common and the second preferred stock. The usual majority voting power of the common stock is expressly limited by the certificate of incorporation, which provides that no vote or consent of the stockholders upon any question of consolidation, lease, sale, or conveyance of any of the property, rights, privileges, or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business; or of the increase or reduction of the capital stock of the corporation; or of the guaranteeing of bonds of any other corporation; or the alteration or amendment of the certificate of incorporation, shall "become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty (80)

per cent of the then issued and outstanding common stock of the corporation" (Ex. 10, R. 55, 351–364). The certificate of incorporation provides that the holders of the second preferred stock "shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-Laws of the corporation, unless and until any time after the close of the second fiscal year . . . the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding preferred stock at the rate provided to be cumulative as aforesaid" (Ex. 10, R. 55, 351–364). The second preferred stock is not redeemable, but the first preferred stock may be redeemed on any dividend payment date at par plus a premium of 10 per cent plus all unpaid cumulative dividends (*Ibid.*).

The appellant's entire case rests ultimately upon the assertion that 665 of the 1,000 issued and outstanding shares of appellant's common stock are deposited under a voting trust agreement and that all rights and privileges pertaining to those shares are held and exercised by three voting trustees who are "in no way connected or affiliated with the New York Telephone Company" (Appellant's Brief, p. 21). Appellees cannot accept this description of the voting trust, nor do they admit

that its effect is to prevent control by the New York company.[15] But even if appellant's characterization of the voting trust is accepted at face value, the conclusion based theron is unsound. Irrespective of the voting trust, the ownership of one-third of appellant's common stock and of all of its second preferred stock confers upon the New York company a degree of control which falls within the scope of Section 2 (b) (2).

This conclusion follows from two circumstances: First, by reason of its ownership of all of the second preferred stock and one-third of the common stock, the New York Telephone Company can in many major matters exercise voting control far in excess of that possessed by the stock deposited in the voting trust. Merely by virtue of its ownership of the second preferred stock the New York Telephone Company has equal voting rights with the common stockholders on all matters except two—the election of directors and amendments to the By-Laws. As to all corporate matters except these, the power of the New York Telephone Company to control is absolute and unqualified. In the second place, by reason of its ownership of one-third of the common stock and the requirement that 80 per cent of the common stockholders assent in many matters, the New York Telephone Company exercises an additional power of control over the appellant in the nature of a veto power. It is sub-

[15] This point is discussed infra pages 47 to 53.

mitted that these elements of control are substantial and cannot be minimized by reference to the degree in which they may affect the ordinary operations of appellant.

The substance of the claim of appellant both before the Commission and in the court below is that the control of the Rochester Telephone Corporation, which has more than thirteen and one-quarter million dollars in securities outstanding, is vested in the majority of the common stock which represents an investment of only $66,550. And this claim is urged despite the fact that the New York Telephone Company has an investment in the corporation amounting to $4,847,500 in common and preferred stock and actually owns and controls in its own name *97 per cent of the stock of appellant which concededly has present voting privileges* with respect to many important corporate matters (R. 394–395).[16]

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[16] In its brief (p. 38) appellant charges that the determination of the Commission in this case is inconsistent with its previous decision in *In the Matter of Jamestown Telephone Corporation*, 4 F. C. C. 326 (1937). The entire record upon which the Commission acted in the *Jamestown* case is not before this Court. The Commission's report indicates, however, that in at least two respects the situation there under consideration differed radically from the case at bar (4 F. C. C. 337, 338–339): (1) No part of the capital investment made by any of the local independent stockholders was supplied directly or indirectly by the New York Telephone Company; (2) There was affirmative evidence establishing not only independence on the part of the Jamestown Telephone Corporation but active conflict, including *litigation*,

Appellant devotes a considerable portion of its brief (pp. 22–26) to the citation of decisions and textbook writers to the effect that "The ultimate source of corporate control * * * is vested in stockholders having a majority of the voting stock." Assuming, for the purpose of argument only, that this statement is correct, it does not materially assist appellant. The voting power of the shareholders of the Rochester Telephone Corporation is vested in the owners of both the common and the second preferred stock, of which the New York Telephone Company owns approximately 97 per cent—33½ per cent of the common stock, and 100 per cent of the second preferred stock. The fact that there are certain corporate matters with respect to which the second preferred shareholders are not entitled to vote does not warrant the assumption of appellant that the sole test of control must be found in the distribution of the common stock (Appellant's Brief, p. 21). In any view of the matter, the Commission was clearly justified in considering the ownership of the second preferred stock in its attempt to ascertain whether appellant was controlled by the New York Tele-

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between it and the New York Telephone Company. Furthermore, if such an inconsistency does exist it has no bearing on the present case. *Cf. Virginian Ry.* v. *United States*, 272 U. S. 658, 663, where this Court said with respect to an order of the Interstate Commerce Commission: "This Court has no concern * * * with the alleged inconsistency with findings made in other proceedings before it [the Interstate Commerce Commission]."

phone Company. There is no merit in the contention that in determining the issue of control ownership of the majority of a certain class of stock may be disregarded merely because the voting rights of the stock are not absolute and unqualified. This the appellant itself implicitly concedes. The appellant insists in effect that the corporation is controlled by the 665 shares of common stock which are deposited under the voting trust agreement. It should be noted that the voting rights of this stock are not absolute and unqualified because on any major corporate matters action can be taken only if approved by 80 per cent of the issued and outstanding common stock.

It was claimed by appellant before the Commission that it is not likely that any occasion requiring the 80 per cent vote or consent of the common stockholders will arise in the near future, although it was admitted that such consent had been necessary on at least one occasion in the past (R. 110). In its brief (pp. 28–29) appellant also contends that even though approximately one-third of the common stock and all of the second preferred stock is held by the New York Telephone Company, it is not in fact vested with power to control because neither the voting trustees, who control two-thirds of the common stock, nor the New York Telephone Company can at any time exercise an 80 per cent vote of the common stock without the aid or consent of the other. From this appellant concludes that such power of control as the New York Telephone Com-

pany may possess is at best a negative or veto power which is equally possessed by both parties and enables either to block the other on any major question which may arise. Under these circumstances, it is argued that the New York Telephone Company has no such control over the affairs of appellant as was contemplated by Congress in the exemption provisions of Section 2 (b) (2) of the Act. It is submitted that the argument of the appellees in this brief concerning the broad construction which should be given to the term "control" completely disposes of the contention of appellant in that regard. The power to check and obstruct affirmative action by a corporation is as real and substantial as the power to exercise an affirmative right of action. It may be true that when large blocks of stock are wide-spread among shareholders, the veto power is not necessarily a means of locating corporate control. But where the voting shares are divided between two entities the veto power must necessarily be considered in any attempt to locate the source of control.

The affairs of appellant are governed by a Board of Directors, consisting of fifteen men, ten of whom are named by the voting trustees and five by the New York Telephone Company (R. 63). Of the ten directors elected by the voting trustees only one owns any common stock (R. 148). The policies of appellant are governed by an Executive Committee consisting of five directors, three of whom are

named by the voting trustees and two by the New York Telephone Company (R. 66). Provision is made in appellant's articles of incorporation for cumulative voting in the election of directors and executive committee members to insure the New York Telephone Company's representation in the ratio as above stated (R. 354; Ex. No. 10). This arrangement is not calculated to impair the power of the New York Telephone Company to control the appellant. The influence and domination which a group interest may exercise through the election of a minority of the members of a board of directors cannot be measured by reference to mere numbers. Cf. *Globe Woolen Co.* v. *Utica Gas & Electric Co.*, 224 N. Y. 483, 489; 121 N. E. 378, 379–380 (1918). A compact minority, acting as a unit on behalf of a definite interest, may well exercise an influence disproportionate to its ~~members~~ nominees. As long as the New York Telephone Company is entitled to elect five members of the board of directors of appellant it cannot be said with any assurance that the voting trust agreement serves to insulate appellant from the control of the New York Company. This is not to suggest that the New York Telephone Company has exerted or is exerting an improper influence on the management of appellant. On the other hand, appellees submit that it is desirable to avoid an analysis which attaches too much significance to the voting trust agreement and not enough importance to the

existence of a predominant power to control the major affairs of appellant.

Another point worthy of mention is the previous background of the man who was selected to be the general manager of appellant when it was originally organized and who is now its president. John P. Boylan was the first general manager of appellant and came to that company from the Mountain Home Telephone Company, which was admittedly controlled by the New York Telephone Company (R. 137). He continued in the position of vice-president and general manager of appellant until the death of Mr. Fuller, at which time he was made president and a member of the board of directors. Although Boylan was appointed one of the trustees of the voting trust agreement, he does not own a single share of stock which has any voting rights and only 20 shares of the first preferred stock. Appellant states in its brief (p. 43) that any inference which may be drawn from these facts with respect to the issue of control is too weak to warrant consideration. But appellant makes no comment on the testimony of Boylan contained in the record before the Commission, to the effect that the Mountain Home Telephone Company "had pretty much the same setup as we have now in the Rochester Telephone Corporation * * *" (R. 137). The Commission considered this testimony to be revealing, particularly when it is realized that the Mountain Home Telephone Company was concededly

controlled by the New York Telephone Company through a majority stock ownership although the Bell had only two directors out of fifteen on the Board (R. 137).

B. AN EXAMINATION OF THE HISTORY OF APPELLANT AND OF THE VOTING TRUST SUPPORTS THE COMMISSION'S CONCLUSION THAT APPELLANT IS CONTROLLED BY THE NEW YORK TELEPHONE COMPANY

*1. The history of appellant*

The Rochester Telephone Company (corporate predecessor of appellant) was organized in 1899 as an independent company in the territory of Rochester, New York (R. 35). For some time after its creation, the company was reasonably successful in its operation but by the year 1909 it had become increasingly evident that the company was not going to be a financial success (R. 35). Competition between the independent telephone companies and the American Telephone and Telegraph Company, the parent company of the New York Telephone Company, was very active in Western New York State during the period from 1904 to 1911 and thereafter (R. 303). This competitive situation caused a period of abnormal expansion of telephone service, with the result that both the American Telephone and Telegraph System and the independent companies were forced to make large expenditures for duplicate equipment and service (R. 303). The tendency of the public was to patronize the company with the larger

number of subscribers with the result that in some localities the predominant exchange was the Bell System and in others an independent company (R. 303). In Western New York State, as in many other sections of the country, this situation naturally led to isolation of the district served by one company from those served by other companies (R. 303).

As a result of this competitive situation in the Rochester district, the Rochester Telephone Company and the New York Telephone Company made arrangements to merge in one company the properties which they owned in the Rochester territory. A pre-organization agreement dated February 25, 1938, was executed by and between George R. Fuller, W. Roy McCanne, and Frederick W. Zoller, all officers of the Rochester Telephone Company, as individuals, the Rochester Telephone Company, and the New York Telephone Company, in which it was agreed that a new corporation, to be known as the Rochester Telephone Corporation, was to be formed to acquire all the property of the Rochester Telephone Company and the New York Telephone Company in the City of Rochester and territory adjacent thereto (R. 307–328; 329–334).[17] In accordance with this agreement, the New York Telephone

[17] Supplemental agreements were entered into March 1, 1920, and May 1. 1921, between the same parties changing certain unimportant details of this arrangement (R. 334–341).

Company agreed, under certain definite conditions, to provide all the money required for the purchase of the various properties, both of the New York Company and the Rochester Company, and for the payment of all expenses incurred in the consummation of the entire transaction (R. 49; 307–328; 329–334; 334–41). A supplemental agreement, also dated February 25, 1918, between Messrs. Fuller, McCanne, and Zoller and the New York Telephone Company provided for the payment of a fixed sum to Messrs. Fuller, McCanne, and Zoller as compensation for the performance of certain specified services which it was stated in the contract were to be performed in connection with the organization of the appellant (Ex. 5, R. 49, 329–334).

Among other things, the supplemental agreement required Fuller, McCanne, and Zoller:

1. To secure a preponderance of public sentiment in favor of the consolidations within the territories affected;

2. To obtain written consent of the Department of Justice to the consolidation of the Federal Telephone and Telegraph Company in Buffalo with the New York Telephone Company;

3. To use their best efforts to effect the sale and conveyance of all of the property of the Rochester Telephone Company to the new Rochester Telephone Corporation;

4. To incorporate the Rochester Telephone Corporation in accordance with the terms of the above mentioned agreements;

5. To secure approval of the Public Service Commission of New York as to certain schedules of rates already established in the agreement;

6. To purchase 665 shares of common stock out of a total of 1,000 authorized shares of the new corporation for cash at a par value of $100 per share and to subject such shares to a voting trust agreement;

7. To present to the New York Telephone Company satisfactory proof of the complete performance of all of the required services, in return for which the company would pay them the sum of $70,000, it being expressly stipulated that $66,500 of this amount was to be used by the individuals to purchase the above mentioned 665 shares of common stock (Ibid.; R. 48).

Appellant was incorporated February 14, 1920, for the purpose of acquiring and consolidating the properties of the New York Telephone Company in the Rochester territory and the Rochester Telephone Company (R. 55, 351–364; Ex. No. 10). The consolidation was affected by appellant's taking all the properties of both of these companies at an appraised valuation approved by the New York Public Service Commission, in accordance with the provisions of the pre-organization agreement (R. 42, 307–329; Ex. No. 4). The valuation of the Rochester Telephone Company was fixed at $1,600,000 subject to the bonded mortgage indebtedness of $1,058,000, which was paid with bonds issued by appellant for that purpose (R. 46–47). These bonds

have since been retired (Ibid.). The properties of the New York Telephone Company in the Rochester territory were valued at $4,814,000 and were paid for by appellant with preferred (now designated as second preferred) stock for the full amount at par value (R. 59–60). By its articles of incorporation, appellant was authorized to capitalize its investment for $7,000,000 and to issue 70,000 shares of stock with a par value of $100 each, consisting of 1,000 shares of common stock and 69,000 shares of 5% cumulative preferred stock (R. 55, 351–364; Ex. No. 10). In March 1926 appellant obtained authority to increase its capitalization to $12,000,000 and to issue 50,000 shares of 6–6½% cumulative preferred stock, each with a par value of $100 (R. 62, 376–385; Ex. No. 15). Under the certificate of authority this issue was classified as first preferred stock and the original preferred stock was reclassified as second preferred stock (Ibid.).

*2. The history of the voting trust*

The pre-organization agreements, which have been described at pages 44 to 46, *supra,* provided that the 665 shares of appellant's common stock purchased by Fuller, McCanne, and Zoller, with funds furnished by the New York Telephone Company, were to be immediately deposited and held in a voting trust, and that 335 shares of the common stock were to be issued to the New York Company.

These arrangements were carried out. On July 29, 1921, after the consolidation of the properties of these two companies, the 1,000 shares of common stock of appellant were issued as follows: to George R. Fuller, as trustee, 645 shares; to W. Roy McCanne, 10 shares; to Fred C. Goodwin, 10 shares; to Tage P. Sylvan, Vice-President of the New York Telephone Company and one of the incorporators of appellant, 10 shares; and to the New York Telephone Company 325 shares (R. 57, 371–373; Ex. No. 13).

It thus appears that the 665 shares of common stock, purchased with moneys provided by the New York Telephone Company were divided among Messrs. Fuller, McCanne, and Goodwin. It is to be noted that although paid to him for alleged services, the 645 shares of common stock were not issued to Fuller in his own name but merely as trustee (R. 375). For whom Fuller in the first instance was to hold this stock in trust is not definitely or satisfactorily disclosed by any of the testimony given at the hearing before the Commission.

Thereafter, on November 10, 1921, the stock certificates previously issued were cancelled, and a new certificate for 665 shares was issued to Fuller, Goodwin, and McCanne as voting trustees (R. 375). These persons became the first voting trustees and remained so until the time of the death of Fuller and McCanne (R. 97–98). Fuller died in 1926;

at that time the stock standing in his name as trustee passed to Goodwin and McCanne jointly, and J. Foster Warner was appointed a voting trustee in his place (R. 57, 371–373; Ex. No. 13). McCanne died in 1934 (R. 98), and thereafter John P. Boylan, President and general manager and director of appellant, was made voting trustee in his place (R. 57).

On November 10, 1921, when the 665 shares of stock were first placed under the voting trust, the following voting trust certificates were issued: One in the name of Fuller for 375 shares, one in the name of Goodwin for 280 shares, and one in the name of McCanne for 10 shares (R. 371). Goodwin testified that at the outset Fuller made him a present of the beneficial interest in certain shares of the common stock; that when Fuller died, McCanne and Goodwin purchased the balance of Fuller's beneficial interest; and that when McCanne died, Goodwin purchased McCanne's beneficial interest in the stock. After McCanne's death Goodwin became the beneficial owner of the entire 665 shares of stock held under the voting trust agreement (R. 97–98, 373).

Goodwin testified that he and his wife are now the owners of the voting trust certificates of all the common voting stock of appellant, except the 335 shares owned by the New York Telephone Company (R. 61, 373). The stock is still deposited in a voting trust under the agreement which expired on August 1, 1936, but Goodwin testified that the

agreement was to be reexecuted for another ten-year period with the same voting trustees, namely, Messrs. Goodwin, Boylan, and Warner (R. 59).

It is plain from the record that the limitation of the amount of common stock and the creation of the voting trust were arrangements designed to protect the interests of the New York Telephone Company. Goodwin's testimony on this point was quite explicit (R. 79, 81, 82):

> Q. Was there any discussion at all with reference to the amount of common stock to be issued, as to the desirability of permitting citizens of Rochester to participate, to purchase and hold some of that common stock?
>
> A. That was not feasible.
>
> Q. Why?
>
> A. Because the Bell Company would never, the New York Telephone Company, and very properly, would not put $5,000,000 of their property in the hands of a small group in the City of Rochester who knew nothing about the telephone business. It would have been suicide for them to do it.
>
> Q. Why?
>
> A. Because those men would not know anything about running a telephone business. *That is why this scheme was thought of, so that the Bell Company would know they were putting their properties in the hands of men that they believed were trustworthy and that they knew knew something about running the telephone business.*
>
> * * * * *

A. I have said the Bell Company was not willing—and I think they were perfectly reasonable and wise in it—*they were not willing to turn over about $5,000,000 worth of property represented by their preferred stock to a group of men, however organized, whom they did not know, whom they had no confidence in so far as their ability to run a telephone company was concerned.* Now, they had seen these men operate in Rochester, they knew they had done a fairly good job within their limitations, and they felt content, with a fair representation in the new company that those men should have their properties to operate.

* * * * *

Now, there is a very good reason why that common stock could not have been made $1,000,000 instead of $100,000 and, as you say, let the public in. You can only have a voting trust for 10 years. At that time you could only have it for five years in the State of New York. *At the end of that five-year period, as the picture then appeared, if we had put out that stock neither we nor the Bell, and God only knows who might control the company.* [Italics supplied.]

It is a fair inference that the voting trust was created to enable the New York Telephone Company to maintain some degree of influence and control over the 665 shares of common stock which it did not own. Goodwin's frank admission that the purpose of the arrangement was to insure that the appellant would be controlled by persons whom the

New York Company regarded as "trustworthy" indicates that it was assumed at the very least that a community of interest would exist between the voting trustees and the New York Company. Admittedly, this community of interest was not embodied in any legal device which permitted the New York Company legally to compel the voting trustees to any particular course of action. But the reality of the common interest and of the resulting control is not dependent upon external manifestation in a legal device. Its existence may better be tested by the willingness of the New York Telephone Company to invest approximately $4,800,000 in the stock of the appellant. As Goodwin points out in his testimony, which has been quoted above, in view of the size of the New York Company's investment, the retention of some degree of influence and control was to be expected; the failure to do so might well be regarded as lack of ordinary business prudence on the part of the New York Company. This is not to say that either the New York Company or the voting trustees were or have been guilty of any improper or illegal conduct. The appellees make no such charge. But the appellant's entire case rests upon the contention that the voting trust, of itself and apart from all other considerations, makes control by the New York Company impossible. The appellees submit that when the history and the purpose of the voting trust device is examined, that device fails to sustain the heavy burden which appellant's argu-

ment places upon it. Far from establishing appellant's independence, careful examination discloses the voting trust as merely another device of control—a device which operates with more subtlety and in a less tangible form than outright ownership of all of the common stock, but a device of control none the less.

The record before the Commission discloses that the predecessor, Rochester Telephone Company, had no other stock than common stock authorized or outstanding and that its ownership was widespread among the citizens of Rochester who were not particularly friendly to the New York Telephone Company and its parent corporation, the American Telephone and Telegraph Company (R. 74, 79). The record also indicates that five of the nine original incorporators of the appellant who subscribed to the common stock were prominent citizens of Rochester, but only three of them ever received any of this stock (R. 84). And of the present fifteen members of the Board of Directors, ten, including Goodwin, are prominent citizens of Rochester, but not one of them, excepting Goodwin, has ever owned a single share of voting stock but merely serve on the Board of Directors "as a matter of civic interest" (R. 148).

*3. The approval of the Department of Justice under the so-called "Kingsbury Commitment" is irrelevant*

Appellant relies upon the fact that the Department of Justice expressed the opinion that the or-

ganization of appellant "would not be contrary to the Kingbury Commitment" (Appellant's Brief, pp. 8, 22, 37, 38). Appellees contend that the action of the Department of Justice, whatever its meaning and effect, has no bearing upon the issue of corporate control now before this Court.

The circumstances which gave rise to the "Kingsbury Commitment" may briefly be described as follows: During the years prior to 1913, the American Telephone and Telegraph Company and its subsidiaries succeeded in purchasing a number of financially unsuccessful independent companies, with the result that complaints against these acquisitions were filed with the Attorney General of the United States (R. 36). In 1913 the Department of Justice was considering whether to take steps, under the provisions of the Sherman Act, to prevent the further acquisition of independent companies by the Bell System (R. 36). In order to avoid impending difficulties with the government because of these practices, Mr. N. C. Kingsbury, the Vice-President of the American Telephone and Telegraph Company, held several conferences with the Attorney General regarding the policy of his company (R. 36). These conferences resulted in a letter dated December 19, 1913, written by Mr. Kingsbury to the Attorney General (R. 296–299). The letter read in part as follows (R. 297):

> Neither the American Telephone and Telegraph Company nor any other company in

> the Bell system will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling, or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell system, or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell system.

Prior to, and at the time that this letter was written, the New York Telephone Company, a subsidiary of the American Telephone and Telegraph Company, was operating in competition with several independent telephone companies in western New York State. These competing independent companies were the Federal Telephone and Telegraph operating in Buffalo, the Home Telephone Company in Jamestown, and the Rochester Telephone Company in Rochester (R. 39, 299–303). The organization of appellant was a part of a general plan for dealing with the competitive situation which existed in Buffalo and Jamestown, as well as in Rochester. The plan provided for the acquisition by the New York Company of the Federal Telephone and Telegraph Company operating in Buffalo and for the organization of new companies in Rochester and Jamestown to take over and operate the properties previously held in those terri-

tories by the New York Company and certain independent companies (R. 39, 40, 296–299).

This plan was submitted by Mr. Kingsbury to the Attorney General of the United States in a letter dated November 9, 1917, which states, among other things, that "public approval" of the plan had already been expressed in the various company territories involved and requested the approval of this arrangement by the Department of Justice (R. 39–40, 299–303). In response to this letter, the Attorney General replied on January 11, 1918 (R. 346):

> Of course the Department cannot undertake either to approve or disapprove these proposed transactions in the sense of determining whether they would or would not violate any law of the United States, since that is a judicial question, and its determination might, moreover, be affected by other transactions not now before the Department. However, as the commitment of the American Telephone and Telegraph Company expressed in its letter to the Attorney General dated December 19, 1913 [Kingsbury Commitment] was formulated in conference with the Attorney General it is proper to say that, *assuming the facts and conclusions stated in your letter of November 9, 1917, and disclosed by the other data submitted, to be accurate and complete in all respects, especially the representation that because of its insolvent condition the*

*Federal Company could not in any event continue as a going concern, the proposed plan for readjustments at Buffalo, Rochester, and Jamestown and in the tributary districts, taken by itself, would not in the opinion of the Department be contrary to that commitment* [R. 349–350]. [Italics supplied.]

As the text of this letter shows, it was nothing more than an informal expression of opinion by the Department of Justice that the proposed arrangements did not violate the conditions laid down in Mr. Kingsbury's letter of December 19, 1913. As such, it has, of course, no decisive legal effect. The letter does not on its face purport to express even an informal opinion as to whether, if the transaction were consummated, the New York Company would control the appellant. Inasmuch as the letter of the Department was based entirely upon paper representations which at the time the letter was written had not been carried out, any expression of opinion on that question would necessarily have been of little consequence.

Furthermore, even if it were assumed that the letter by implication expressed some opinion on the subject of control, it by no means follows that the expression of opinion would have any relevance in the instant case. The Kingsbury Commitment was made with reference to possible violations of the Sherman Antitrust Act. The test of corporate con-

trol applicable to determine whether that Act has been violated has no necessary bearing upon the issue in the instant case. The question at bar is whether the New York Telephone Company controls appellant within the meaning of Section 2 (b) (2) of the Communications Act of 1934. The factors which constitute control for purposes of the kind of regulatory jurisdiction conferred by the Communications Act of 1934 differ from the factors which are relevant in a case arising under the anti-trust laws.

Finally, the opinion of the Department was given at a time when the arrangements for the organization of the appellant had not been consummated. The situation must now be viewed in the light of facts and of experience which the Department of Justice could not consider in 1918. The frank admissions of Mr. Goodwin as to the purpose in creating the voting trust and the history of the voting trust itself since 1921, for example, are factors which the Department of Justice could not have considered in 1918 in formulating its opinion. Nevertheless, these are factors which may properly be taken into account in consideration of an issue of control. It is evident that the situation existing in 1921 may well have been so different from the situation existing fifteen years later that no opinion expressed on the one situation would have any bearing upon the other.

## IV

### THE COURT BELOW DID NOT ERR IN ITS CONSIDERATION OF THE EVIDENCE IN THE RECORD BEFORE THE COMMISSION

Appellant contends that the court below erred in failing to exercise an independent judgment of the evidence on the issue of control (Appellant's Brief, pp. 16–20). There is no question in this case of a denial of the right to a trial *de novo* on the issue of control. In the court below, appellant indicated that it did not desire to introduce any evidence but was willing to rest its case on the record made before the Commission (R. 449). In fact, it was apparently appellant's view at that time that the court was only required to review the record before the Commission to determine if there was evidence to support the Commission's finding.[18]

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[18] The bill of complaint alleges that "Upon the facts proved before said Commission by undisputed and uncontradicted evidence" the Company was entitled to exemption under Section 2 (b) (2) of the Act (R. 4). On oral argument in the court below appellant confined its case to the lack of any evidence whatsoever to support the determination of the Commission and did not request the court to independently review that evidence and reach an independent determination. In its brief in that court appellant stated: "The purpose of this review is to have this court determine whether there are substantial *facts* to support the Commission's conclusion" (District Court Reply Brief of Rochester Telephone Corporation, p. 4). Appellant now seeks to charge as error the failure of the court below to go beyond what appellant then considered to be the scope of the issue

The argument now advanced by appellant raises two fundamental questions: *First,* was the determination here involved one which had been confided to the Commission by Congress and therefore final if not arbitrary or unreasonable and, *second,* did the court below exercise its independent judgment on the evidence before it? It is our view that the Commission was authorized by Congress to make the determination and that the court below should have reviewed the evidence before the Commission only for the purpose of determining whether there was any evidence to support the finding. However, we think that the court's opinion, findings of fact, and conclusions of law clearly indicate that it went farther and exercised its independent judgment on all of the facts. We therefore insist that regardless of what may be the proper scope of review, the decision of the court below should be affirmed.

### A. THE COMMISSION WAS AUTHORIZED BY CONGRESS TO MAKE THE DETERMINATION HERE INVOLVED

Appellant's primary contention with respect to the scope of review relates to the jurisdiction of the Commission to make the determination as to control. It is contended by appellant that "Congress

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in the case. However, it should be noted that appellant did not assign as error nor did it state as one of the points to be relied upon in this Court the alleged failure of the court below to independently review and consider the evidence on the issue of control.

*did not* delegate this power to the Commission" (Appellant's Brief, p. 18). A substantial portion of this brief (*supra,* pp. 19–33) has been devoted to an analysis of the congressional intention with respect to the meaning of the term "control" as used in the exemption clause of the Act. In view of the difficulties which Congress anticipated in connection with the application of that term to particular situations, we submit that it was the intention of Congress that this determination should be made by the Commission. Such an implication arises from the "full authority and power" of the Commission under the Act to "institute an inquiry, on its own motion. * * * concerning which any question may arise under any provision of this Act, or relating to the enforcement of any provision of this Act" (Section 403, 48 Stat. 1094, June 19, 1934). This implication is strengthened by reason of the practical difficulties which the courts would experience in attempting to determine the issue of control in regard to the numerous local telephone companies claiming exemption under the Act [19] and by the fact that the administration of the Communications Act as a whole has been committed to an agency specially qualified to make such a determination on the facts presented to it in the course of a regularly conducted hearing. There would appear to be no logical justification for refusing to

[19] See the cases cited in note 23, *infra.*

permit the Commission to decide an issue which does not substantially differ from the other determinations which it is specifically required to make under the Act.

The administrative proceedings which lie at the foundation of this controversy were conducted, as stated above, pursuant to the authority vested in the Commission by Section 403 of the Communications Act.[20] By virtue of the authority contained in Sections 203 (a), 210, 211 (a), 213, and 215 of the Act, the Telephone Division of the Commission issued general orders Numbers 1, 2, 3, 5, 6a, and 9, requiring the submission of detailed information concerning the organization, operation, and management of wire telephone carriers subject to the Commission's jurisdiction (R. 20–30). This information was required to be filed with the Commission at various times between September 1, 1934, and March 1, 1935 (*Ibid.*). On February 28, 1935, the Telephone Division issued a notice that it had under consideration "the matter of the jurisdiction of the Commission under the Communications Act of 1934 * * *; and particularly the application of Sec. 2 (b) (2)." *In the Matter of Classification of Telephone Companies,* 3 F. C. C. 37, 38. Many carriers, claiming exemption from the jurisdiction of the Commission on the basis of Section 2 (b) (2), requested an opportunity to present argument to the Commission in support of their

[20] This section is set forth in the appendix at page 87, *infra.*

construction of the Act. The Commission granted this request and, following an extended hearing, oral argument, and the submission of briefs by interested parties, the Commission issued a report stating, among other things, that the term "control" as used in Section 2 (b) (2) of the Act "contemplates a mixed question of fact and law to be determined in each case heard and considered by the Commission." *In the Matter of Classification of Telephone Companies,* 3 F. C. C. 37, 39.

On October 14, 1935, upon the failure of appellant to respond to the general orders of the Telephone Division applicable to carriers within its jurisdiction, the Commission issued an order requiring that appellant either file the information requested in said orders or file an answer setting forth the facts upon which appellant justified its failure to respond to said orders of the Telephone Division (R. 6). Relying upon its authority under Section 403 of the Act, the Commission held a hearing in order to give appellant ample opportunity to state its objection to the submission of information requested in the general orders of the Telephone Division (R. 30). It should be noted that at this time the Commission could have enforced its general orders against appellant by application to the appropriate district court of the United States pursuant to its authority under Section 401 of the Act.[21] Instead, however, the Commission

[21] This section is set forth in the appendix at page 86, *infra.*

utilized its authority under Section 403 in order to accord appellant an opportunity to demonstrate that it was within the exemption set forth in the Act. At the conclusion of the hearing, and after argument and the submission of briefs, the Commission pursuant to its authority under Section 404 of the Act issued "a report in writing * * * together with its decision" classifying appellant as a carrier subject to the terms of the Act.[22] This practice has been uniformly followed by the Commission in those cases where the single question involved was that of an exemption under Section 2 (b) (2) of the Act.[23] It is submitted that the Com-

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[22] This section is set forth in the appendix at page 88, *infra*.

[23] *Capital City Telephone Company*, 3 F. C. C. 189; *Champaign Telephone Company*, 3 F. C. C. 379; *Chillicothe Telephone Company*, 3 F. C. C. 233; *Citizens Telephone Company of Clay County*, 3 F. C. C. 203; *De Calb-Ogle Telephone Company*, 3 F. C. C. 239; *Intra State Telephone Company*, 3 F. C. C. 170; *Mansfield Telephone Company*, 3 F. C. C. 263; *Cass County Telephone Company* 3 F. C. C. 406; *Rochester Telephone Corporation*, 3 F. C. C. 247; *Garrett Telephone Company*, 3 F. C. C. 320; *Princeton Telephone Company*, 3 F. C. C. 164; *Jamestown Telephone Corporation*, 4 F. C. C. 326; *In the Matter of North-West Telephone Co.*, Docket No. 3364, decided August 2, 1938; *In the Matter of Milton & Milton Junction Telephone Co.*, Docket No. 3360, decided August 2, 1938; *In the Matter of Norfolk & Carolina Tel. and Tel. Co.*, Docket No. 4830, decided October 25, 1938; *In the Matter of Norfolk & Carolina Tel. and Tel. Co. of Va.*, Docket No. 4831, decided October 25, 1938; *In the Matter of Tri-County Telephone Co.*, Docket No. 4344, decided April 20, 1938; *In the Matter of Santa Barbara Telephone Co.*, Docket No. 3311, decided May 11, 1938.

mission was completely justified in using this administrative procedure under Sections 403 and 404 of the Act rather than its enforcement authority under Section 401 of the Act. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

B. THE DETERMINATION OF THE COMMISSION WAS BINDING ON THE COURT BELOW

Prior to 1934 federal supervision of interstate telephone carriers was vested in the Interstate Commerce Commission. By the provisions of the Communications Act of 1934 carriers engaged in interstate communication by wire or radio were subjected to new legislation administered by the Federal Communications Commission. The language of the Act to Regulate Commerce in its regulatory and procedural aspects is substantially similar to analogous provisions of the Communications Act of 1934 and orders issued under both acts are reviewable by the same procedure. Neither act contains any statutory language defining or limiting the scope of judicial review in these proceedings. It is therefore necessary, in determining the extent to which the courts are authorized to review the orders of the Federal Communications Commission to examine the decisions discussing the scope of review with respect to orders of the Interstate Commerce Commission. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, and *American Telephone & Telegraph Company* v. *United States*, 299 U. S. 232.

This Court has decided in numerous cases that the determinations of the Interstate Commerce Commission [24] as well as of other administrative bodies [25] are binding if they are supported by substantial evidence and are not arbitrary or capricious. In *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470, this Court stated that it would not "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon [its] conception as to whether the administrative power has been wisely exercised." On other occasions it has been stated that "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its con-

[24] *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Pennsylvania Company* v. *United States*, 236 U. S. 351; *Florida* v. *United States*, 292 U. S. 1; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *Virginian Ry.* v. *United States*, 272 U. S. 658; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

[25] *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426, 434; *Morgan* v. *United States*, 298 U. S. 468, 477; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Decatur* v. *Pauling*, 14 Pet. 497; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479; *Lewis* v. *Frick*, 233 U. S. 291; *Tang Tun* v. *Edsell*, 223 U. S. 673.

clusions, or with the alleged inconsistency with findings made in other proceedings before it" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665), and that "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment" (*Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304). Appellees submit that these decisions correctly state the rule which should be applied in reviewing the order here involved.

*The determination made by the Commission is not one of law upon which courts must exercise independent judgment*

Appellant contends that the issue of corporate control is a question of law or at least a mixed question of law and fact with respect to which the court below should have exercised its own independent judgment (Appellant's Brief, p. 17). Appellees concede that where the validity of administrative determination depends upon pure question of law the trial court must exercise its independent judgment in deciding the controverted issue. But the issue of corporate control in this case does not depend upon a question of law; the question of control raises an ultimate issue of fact.

In its bill of complaint appellant implies that because in its opinion the evidence before the Commission was undisputed and uncontradicted, the Commission committed an error of law in determining that it was controlled by the New York Tele-

phone Company. This Court has held that, even in those cases where the facts are not in dispute, the binding effect of an administrative determination, if supported by substantial evidence, must be recognized. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, the defendants contended that, since the facts asserted in the administrative proceedings were not disputed, the issue became one of law and the lower court was not bound by the decision of the Interstate Commerce Commission as to the meaning of the term "undue preference." In reply to that contention, this Court said (p. 320–321):

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so,* obviously exerted an authority not conferred upon it by the statute * * *. It cannot be otherwise since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

The mere fact that the administrative agency is required to exercise its judgment on the facts in reaching its conclusion does not controvert an ordinary fact determination into a question of law upon which the trial court must exercise its independent judgment. In the usual case where the

courts are called upon to review administrative determinations it is well settled that "The judicial function is exhausted where there is found to be a rational basis for the conclusion approved by the administrative body." *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287.

It is true that the determination as to whether appellant is directly or indirectly controlled by the New York Telephone Company is a question which requires the application of a statutory concept to facts. However, appellant has no serious quarrel with the interpretation which the Commission and the court below have placed upon the concept of corporate control as revealed by the legislative reports on the legislative antecedents of the Communications Act of 1934.[26] Appellant's contention is that the facts contained in the record before the Commission establish that appellant comes within the meaning of the exemption section *as interpreted by both the Commission and the court below.* This approach does not convert a factual determination into a question of law.

Properly regarded, the question as to whether appellant is controlled by another company would appear to be a basic question of fact, independent of any legal issue. The concept of corporate control has a generally recognized meaning, although there may be differences of opinion as to whether

[26] House Report 1850, 73rd Cong., 2nd Sess., pp. 4–5. See Appellant's Brief, p. 20.

particular devices or practices on the borderline come within its terms. But the difficulty in deciding such borderline situations does not make the determination as to control any less one of ultimate fact. It was in precise recognition of this possible difficulty in applying the concept of control to particular situations that Congress refused to define the term and left its application to the Commission to be administered in the exercise of its sound discretion.

However, the proper scope of judicial review in this case does not depend upon any distinction between questions of law and questions of fact. This Court has frequently alluded to the function of the Interstate Commerce Commission in determining whether a particular rate was unreasonable or discriminatory both as making "a determination of fact" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665) and as "determining mixed questions of law and fact" (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547). But this Court has not permitted such artificial distinctions to broaden the scope of judicial review with respect to these determinations. In both the *Virginian Railway* and *Union Pacific* cases the Court has indicated that the decisions of the Interstate Commerce Commission as to what constitutes an unreasonable or discriminatory rate, or an undue preference, are binding if supported by substantial evidence and

not arbitrary or capricious. The authority of the Federal Communications Commission to determine where appellant is directly or indirectly controlled by another telephone company would seem to be clearly of the same character as that of the Interstate Commerce Commission in determining the lawfulness of certain rate practices. See *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238; *Seaboard Air Line Railway Co.* v. *United States,* 254 U. S. 57, 62; *Kansas City Southern Railway Co.* v. *United States,* 231 U. S. 423, 456.

*The scope of review in this case is not determined by the decision in the Idaho case*

Appellant contends that the question of the scope of review applicable in the instant case is foreclosed by the decision in *United States* v. *Idaho,* 298 U. S. 105. This argument begs the question. If this Court agrees with our interpretation of the intent of Congress as disclosed by the entire Act read in the light of its legislative history, the determination of the issue of control was left to the Commission and not to the courts (see, *supra,* pp. 60–65). It follows that the scope of review which must be applied to this determination is governed by the decision of this Court in *Shields* v. *Utah Idaho Central R. R. Co.,* 305 U. S. ——, and not by the decision in *United States* v. *Idaho,* 298 U. S. 105.

In *United States* v. *Idaho,* 298 U. S. 105, this Court held that the determination of the Inter-

state Commerce Commission as to whether a certain trackage was a "spur" and thus within its jurisdiction was a question which had been "left by Congress to the decision of a court—not to the final determination of either the federal or a state commission" (298 U. S. 105, at 109). This Court reached a similar conclusion with respect to a determination of the Interstate Commerce Commission as to whether a railroad was an interurban railway within the meaning of the Act to Regulate Commerce. *Piedmont & Northern Ry.* v. *Interstate Commerce Commission,* 286 U. S. 299; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1. In *Shields* v. *Utah Idaho Central R. R. Co.,* 305 U. S. —, this Court held that Congress had expressly authorized the Interstate Commerce Commission to determine whether a particular railroad was exempted from the Railway Labor Act by reason of its being an interurban electric railway. Under these circumstances, it was held that the determination of the Interstate Commerce Commission was binding on the court if supported by substantial evidence.

It is submitted that the authority conferred by Sections 403 and 404 of the Communications Act authorizes the Commission to make a determination of exemption just as the Interstate Commerce Commission has been empowered to make such a determination under the Railway Labor Act. Hav-

ing utilized its authority under Sections 403 and 404 and having given appellant an opportunity to be heard, offer oral argument and submit briefs on the issue of corporate control, appellees do not believe, in the language of this Court, "that a determination so prescribed and safeguarded was intended to have no legal effect." *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. — at —. In this view of the matter, the determination of the Commission with respect to the control of appellant was binding on the court below since it was supported by substantial evidence and was neither arbitrary nor capricious.

### C. THE COURT BELOW INDEPENDENTLY CONSIDERED THE EVIDENCE

For the reasons set forth above we believe that it was unnecessary for the court below to exercise its independent judgment on the facts involved in this controversy. However, the opinion of the court and its elaborate findings of fact and conclusions of law clearly demonstrate that the court did weigh and independently consider the evidence adduced before the Commission. The findings of fact are twenty in number and cover practically every factual aspect of the present controversy (R. 438–447). Similarly, the opinion of the court indicates that the evidence in the record was independently considered by that court with respect to the controverted issue of control. In its

opinion, the court concisely stated its view of the weight of the evidence as follows: "The plan providing for the organization and incorporation, election of directors, and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company" (R. 437).

The portions of the Court's opinion, torn from their context and quoted in appellant's brief (p. 16), concerning the "binding" effect of the Commission's determination do not prove that the court failed to exercise its independent judgment on the facts. If such language has any significance, it is no more than an expression of the court's view on what the scope of review should be with respect to the issue of control—not a statement of the test which was actually applied. Such statements without more do not detract from the deliberate effort of the court to reach its independent conclusion on the evidence.[27] A similar situation was

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[27] There is a logical explanation for this seeming inconsistency in the court's opinion. In their argument before the District Court appellees contended that an independent review of the evidence by the court would reveal that appellant was not entitled to exemption under Section 2 (b) (2) of the Act. But appellees also argued that the determination of the Commission on the issue of control was binding on the court since it was supported by substantial evidence and not arbitrary or capricious. Appellees requested the court to rule on both of these points. Even if the opinion is interpreted as holding that the limited scope of review should apply, it is equally clear that the court sustained appellees' contentions on the basis of an independent review

presented to this Court in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38. In reply to a contention such as is now made by appellant this Court said (p. 54):

> As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration * * *

Appellant further contends that because the decision of the court below agrees with or substantially follows the report of the Commission, the court failed to exercise its independent judgment. In its brief (p. 16) appellant states "A comparison of the Court's Opinion (R. 437) with the report of the Commission (R. 429) also indicates that the Court made no independent scrutiny of the evidence." The logical implication from this observation seems to be that judicial review is not independent unless the court's opinion differs from or disagrees with the basic determinations of the administrative body. Such a proposition finds no support in the decisions of this Court.

It may be assumed that the court below, in the exercise of its independent judgment on the facts,

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of the evidence. This is the same position which was taken by appellees and the same method of review employed by the lower court in *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322; *aff'd.* 298 U. S. 38.

properly accorded some weight to the determination of the Commission. In adopting the broader scope of judicial review the court would not have been justified in totally ignoring the Commission's decision on the issue of control. It is well settled that even though a trial court is required to review *de novo* an administrative finding, the administrative decision, reached after notice and complete hearing, is entitled to great respect. In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, a case involving an issue of confiscation, this Court said (p. 53):

> *But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence.* On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. [Italics supplied.]

## CONCLUSION

For the foregoing reasons the decree of the court below dismissing the bill of complaint should be affirmed.

Respectfully submitted.

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MARCH 1939.

# APPENDIX

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064; U. S. C., Title 47, Sec. 151) are as follows:

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter

provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

* * * * *

SEC. 4. * * * * (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

Section 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to

establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided,* That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest.

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or local-

ity to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

* * * * *

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them,

who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

* * * * *

SEC. 219 (a) The Commission is authorized to require annual reports under oath from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each); the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the names of all officers and directors, and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the oper-

ating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act; and such periodical or special reports shall be under oath whenever the Commission so requires. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the

Commission, it shall be subject to the forfeitures above provided.

* * * * *

SECTION 401. (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for

the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

* * * * *

SEC. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or re-

lating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

SEC. 404. Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

* * * * *

SEC. 409. * * * (j) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and, upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

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# SUPREME COURT OF THE UNITED STATES.

No. 481.—October Term, 1938.

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| Rochester Telephone Corporation, Appellant, vs. The United States of America and Federal Communications Commission. | On Appeal from the District Court of the United States for the Western District of New York. |

[April 17, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal, under Sec. 238 of the Judicial Code as amended (28 U. S. C. § 345), from a final decree by a district court of three judges, under the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. §§ 45, 47a) as extended by Sec. 402(a) of the Federal Communications Act (47 U. S. C. § 402(a)), dismissing on the merits a bill to review an order of the Federal Communications Commission. 47

At the outset a challenge to the jurisdiction of the District Court confronts us. It involves those problems of administrative law which are implied by the doctrine of "negative orders." Inasmuch as this phrase is shorthand for a variety of situations, sharp heed must be given to the precise circumstances—*inter alia*, the statutory provisions for review, the terms of the contested order, the grounds of objection to it—which in this and other cases have invoked the doctrine.

Section 2(b) of the Communications Act of 1934 provides that, with certain exceptions not here material, the Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." The appellant, Rochester Telephone Corporation (hereafter called the Rochester), is a New York corporation maintaining a system of telephone communications in and around the City of Rochester. For present purposes the Rochester is to be deemed as engaged in interstate communications solely because of physical connections with the facilities of the New York Telephone Company (hereafter called the New York).

The present controversy grew out of a ruling by the Federal Communications Commission that the Rochester owed obedience to a series of orders issued by the Commission. These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes. Copies of these orders were duly served on the Rochester. No response being had, the Telephone Division of the Communications Commission, on October 9, 1935, ordered the Rochester to show cause why it should not be required to file responses to the general orders theretofore served upon it.[1] The Rochester answered, claiming to be outside the requirements of the Act except as to matters not here questioned.

To ascertain the facts in the contested issue, the Commission appointed a trial examiner. At hearings held by him the Rochester entered a special appearance, denying the Commission's jurisdiction and contending that the burden of proof was on the Commission to show that Rochester did not come within the exclusionary provisions of Section 2(b)(2). After a thorough hearing[2] and the submission of briefs, the examiner filed his report, to which the Rochester duly excepted. Upon the basis of these proceedings and of argument before it, the Commission, through its Telephone Division, sustained the findings of its chief examiner, determined that the Rochester was under the "control" of the New York and therefore not entitled to the classification of a mere connecting carrier under Section 2(b) (2). Accordingly, the Commission ordered the Rochester classified "as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." A petition for rehearing before the full Commission was denied.

The Rochester thereupon filed the present bill, alleging that the order entered by the Commission on November 18, 1936, pursuant to its Report, was contrary to undisputed facts and erroneous as a matter of law, and that the Commission's threat to enforce it put the Rochester to the hazard of irreparable injury, and praying that the District Court

"make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission herein-

[1] On November 18, 1935, the order was amended in matters not here relevant.

[2] The hearing before the examiner lasted two days; 221 pages of testimony were taken and 34 exhibits were introduced.

before mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders . . . have already been complied with."

The case was disposed of in the District Court on the pleadings and the record before the Commission.

Below, the Government made no objection to the District Court's jurisdiction, nor did that Court raise the question *sua sponte*.[3] It sustained the Commission's action on the merits and dismissed the bill. Here, the Government urges that under the doctrine of "negative orders" the Commission's order was not reviewable, but, in the alternative, supports the decree on the merits.

The relation of action by the Federal Communications Commission to the reviewing power of the courts is here for the first time. The jurisdictional objection raised by the Government in this case implicates other federal regulatory bodies as well, because the various statutory schemes for judicial review have either been carried over from the Urgent Deficiencies Act, pertaining to orders under the Acts to Regulate Commerce, or because different statutory provisions have by analogy been assimilated to the "negative order" doctrine. That doctrine has not had wholly plain sailing in the many cases, both here and in the lower federal courts, since it first got under way in 1912, in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

The important procedural problems with which this case is entangled therefore call for clarification.

The prior decisions involving the "negative order" doctrine fall into three categories:[4]

> (1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.
>
> (2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or

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[3] Under United States v. Corrick, 298 U. S. 435, 440, and United States v. Griffin, 303 U. S. 226, 229, the doctrine of "negative orders" implies a jurisdictional defect which courts must consider *sua sponte*.

[4] All except one of the prior decisions of this Court on the "negative order" doctrine involved review of action by the Interstate Commerce Commission. United States v. Corrick, *supra*, note 3, involved review of action by the Secretary of Agriculture under the Packers and Stockyards Act.

compelling conduct on his part. The most obvious case is a denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person. A familiar example is that of a shipper requesting the Interstate Commerce Commission for an order compelling the carrier to adopt certain rates or practices which the Commission, on the merits, declines. Another instance is where the Commission authorizes the carrier to depart from the long-short haul clause and a shipper adversely affected seeks to have the authorization set aside.

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction,[5] or rendering a tentative[6] or final valuation[7] under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable.[8]

The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-310.

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[5] United States v. Illinois Central R. R., 244 U. S. 82. Compare Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375.

[6] Delaware & Hudson Co. v. United States, 266 U. S. 438.

[7] United States v. Los Angeles R. R., 273 U. S. 299.

[8] Shannahan v. United States, 303 U. S. 596; compare Shields v. Utah Idaho Central R. R., 305 U. S. 177, 182-184.

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, Sec. 2, U. S. Constitution.[9] Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loathe to authorize review of interim steps in a proceeding.[10]

Group (2) is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant. To rid himself of these restrictions the complainant either asks the Interstate Commerce Commission to place him outside the statute, or, being concededly within it, he invokes the Commission's dispensing power. In this type of situation a complainant seeking judicial review under the Urgent Deficiencies Act of adverse action by the Commission must clear three hurdles: (a) "case" or "controversy" under Article III; (b) the conventional requisites of equity jurisdiction; (c) the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, or where the Commission's order denies an exemption from the terms of the statute, as in the *Intermountain Rate Cases,* 234 U. S. 476, the road to the courts' jurisdiction seems to be clear. There is a constitutional "case" or

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[9] Hayburn's Case, 2 Dall. 409, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, United States *v.* Ferrreira, 13 How. 40; Muskrat *v.* United States, 219 U. S. 346.

[10] Prior to Section 7 of the Act of March 3, 1891, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by Section 6 of the Act of April 29, 1802. See United States *v.* Bailey, 9 Pet. 267. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. Section 237, Judicial Code as amended, 28 U. S. C. Sec. 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. Section 129 and 238 of the Judicial Code as amended, 28 U. S. C. Sec. 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted.

"controversy," *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one "to enjoin, set aside, or annul" an "order of the Commission." 28 U. S. C. Sec. 46, 47.[11] While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative.

[11] The Lehigh Valley case apparently originated the statement, often made in "negative order" cases, that the risk results from the statute, not from the order. But this formula hardly squares with the actualities of the situation in that case. The Panama Canal Act, paragraphs 19-21 of Section 5 of the Act to Regulate Commerce, as amended, forbade community of interest between any common carrier subject to the Act and a competing water carrier. Under paragraph 20, jurisdiction was conferred on the Commission to determine questions of fact as to the existence of actual or potential competitive conditions, either on the application of the carrier or on the Commission's motion, its determination to be final. Under paragraph 21, the Commission was given jurisdiction to extend the time within which operations otherwise prohibited by the statute might be carried on after July 1, 1914, if such extension did not reduce competition and benefited the public. After receipt of notice of the Act from the Commission, the Lehigh applied to the Commission for a ruling that it was not subject to the Act, or, in the alternative, for an extension. The Commission issued an order subjecting the Lehigh to the Act and denying an extension. Thereupon the Lehigh brought a suit to set aside this order and to enjoin the Commission from enforcing it.

As a practical matter the risk of prosecution to which the Lehigh was subjected if it wished to continue to operate its boats was the result of the order. Since the Panama Canal Act provided that the Commission should find the facts under it, there could have been no prosecution without a previous finding by the Commission that the Lehigh was within the Act; once such a finding was made it was subject to the rule of administrative finality. Compare Keogh v. Chicago & N. W. Ry., 260 U. S. 156. Therefore the Commission's order that the Lehigh was subject to the Panama Canal Act was responsible for the risk, as much so as if it had expressly commanded the Lehigh to stop running its boat lines. And assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exception had the same practical effect as a direct command. Intermountain Rate Cases, 234 U. S. 476.

Piedmont & Northern Ry. v. United States, 280 U. S. 469, presents a more complicated situation. Section 1(18-22) of the Act to Regulate Commerce, as amended, prohibits any common carrier by rail subject to the Act from extending its lines or constructing new lines without a certificate of convenience and necessity. This requirement did not apply to "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Upon an application for a certificate by the Piedmont & Northern, coupled with a motion to dismiss on the ground that it was an "interurban electric" railway, for which no certificate was required, the Commission denied the motion to dismiss and denied the certificate on the merits. The bill to enjoin the Commission from taking any proceedings against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The Court held the order was not reviewable, on the ground that the order did not adjudicate the railroad's status, did not command it to do anything, but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function. But this is to view the matter too abstractly. For the Commission itself had instituted the

The complainant can come into court, of course, not to review action within the discretionary authority of the Commission to render an adverse rather than a favorable decision but because he urges errors of law outside the Commission's final say-so. Such an analysis emerges from a long sequence of cases under the Urgent Deficiencies Act viewed in the setting of general doctrines of federal jurisdiction. On the other hand, the result in the *Lehigh Valley* case was reached in the earlier phases of modern administrative law and did not deal with its specific jurisdictional problems in the perspective of underlying principles governing federal equitable jurisdiction. In consequence, the phrase "negative orders" gained currency as though it were descriptive of some technical doctrine of jurisdiction having peculiar relevance to judicial review of orders of the Interstate Commerce Commission and comparable regulatory bodies.[12]

This brings us to the cases in group (3). Here review is sought of action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person. This type of situation is illustrated by *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. Since this case gave rise to the notion that there is a specialized jurisdictional doctrine pertaining to "negative orders," it calls for re-examination. Procter & Gamble Co. filed a complaint with the Interstate Commerce Commission to set aside demurrage rules that imposed charges on private cars left unloaded for over forty-eight hours on

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system whereby it requested preliminary submission to it of the status of "interurban roads. Such a decision was at least the equivalent of a threat of prosecution under the statute, and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation. Compare United States v. Village of Hubbard, 266 U. S. 474.

[12] The initial decision in this group of cases, the Intermountain Rate Cases, 234 U. S. 476, held reviewable the action of the Commission in refusing to grant requested consent to depart from the long-short haul clause. (Section 4 of the Act to Regulate Commerce, as amended.) While this case would seem to control the Lehigh Valley case and at least to be persuasive in the Piedmont & Northern case, it was not mentioned in them. After these two cases, subsequent decisions in this group indicated that the "negative order" doctrine might prevent review of the refusal by the Secretary of Agriculture to accept rates for filing, the Packers' and Stockyard's Act prohibiting the charging of rates except those on file with the Secretary, United States v. Corrick, 295 U. S. 435, and of the refusal to grant an increase in rates of compensation for carrying of mail, the Railway Mail Pay Act of 1916 requiring the carrier to carry the mail at the rate set, United States v. Griffin, 303 U. S. 226. But in both these decisions the result reached was supported by factors irrelevant to the present discussion. On the other hand, in Powell v. United States, 300 U. S. 276, action of the Commission, striking from its files a tariff on the ground that a point was not served by the carrier, was held subject to review as a command to the railway which had filed the tariff not to give the service covered by the tariff.

private tracks. The Commission dismissed the complaint on the ground that the rules were within the carriers' authority to make conditions for the acceptance of private cars. Procter & Gamble then petitioned the Commerce Court to annul the Commission's action and to enjoin the carriers from enforcing the rules. The Commerce Court took jurisdiction but found the Commission's action to be within its authority. On appeal this Court held that the Commerce Court erred in taking jurisdiction and remanded the cause for dismissal.

Clearly Procter & Gamble was authorized under Section 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication — constituting a case or controversy — were present. Compare *Interstate Commerce Commission* v. *Brimson, supra; Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 38. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of Congress authorizing suits "to enjoin, set aside, annul, . . . any order of the Interstate Commerce Commission." To be sure the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court however, have dispensed with this requisite for review.[13]

The impelling consideration underlying the decision in the *Procter & Gamble* case did not concern technical procedure. It was part of the process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the pur-

[13] The Chicago Junction Case, 264 U. S. 258; Venner v. Michigan Central R. R., 271 U. S. 127; Colorado v. United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382; United States v. Idaho, 298 U. S. 105.

poses of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language,[14] particularly when regard is had to the fact that the Court's spokesman was Chief Justice White, who had such a large share in developing modern administrative law.[15] While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act, in 1906,[16] and the Mann-Elkins Act, in 1910,[17] the establishment of similar agencies in many states following the lead of New York[18] and Wisconsin,[19] the widespread recognition that these specific instances marked a general movement,[20] made increasingly manifest the

14 " . . . we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act." 225 U. S. at 296-97. " . . . the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative." 225 U. S. at 298-99.

15 See Chief Justice Taft's estimate of the services of Chief Justice White in "a new field of administrative law": "The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White, in construing the measure and its great amendments has had more to do with placing this vital part of our practical government on a useful basis than any other judge. His opinions in the case of the Texas & Pacific Railway Co. *v.* The Abilene Cotton Oil Co., and the cases which followed it, are models of clear and satisfactory reasoning which gave to the people, to state legislatures, to Congress, and the courts a much-needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing governmental machinery, for the vindication of the rights of the public in respect of national transportation. They are a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." Proceedings on the Death of Chief Justice White, 257 U. S. v, xxv.

16 34 Stat. 584.

17 36 Stat. 539.

18 Laws of New York, One Hundred and Thirtieth Session, c. 429 (1907).

19 Wisconsin Laws of 1907, c. 499, st. 1797 m.

20 See, *e. g.*, Hughes, *Some Aspects of the Development of American Law* (1916) 39 N. Y. B. A. Rep. 266, 269-70; Root, *Public Service by the Far* (1916) 41 A. B. A. Rep. 355, 368-69; Sutherland, *Private Rights and Government Control* (1917) 42 A. B. A. 197.

place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court "ascribed" to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.[21]

From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 226. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.[22] The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541.

In translating these important objectives for effectuating the Congressional scheme to enlarge the independent powers of the Interstate Commerce Commission into a seemingly technical distinc-

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21 Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 44; Interstate Commerce Commission *v.* Louisville & Nashville R. R., 227 U. S. 88, 93; United States *v.* Abilene & So. Ry., 265 U. S. 274, 288; compare Douglas *v.* Noble, 261 U. S. 165, 169. "It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts." Twenty-second Annual Report of the Interstate Commerce Commission, 10.

22 See, also, *e. g.*, Baltimore & Ohio R. R. *v.* United States, ex rel. Pitcairn Coal Co., 215 U. S. 481; Robinson *v.* Baltimore & Ohio R. R., 222 U. S. 506; United States *v.* Pacific & Arctic Co., 228 U. S. 87; Texas & Pacific Ry. *v.* American Tie Co., 234 U. S. 138; Northern Pacific Ry. *v.* Solum, 247 U. S. 477; Director General *v.* Viscose Co., 254 U. S. 498; Dayton-Goose Creek Ry. *v.* United States, 263 U. S. 456; Western & Atlantic R. R. *v.* Georgia Public Service Comm., 267 U. S. 493; Midland Valley R. R. *v.* Barkley, 276 U. S. 482; Board of Railroad Commissioners *v.* Great Northern Ry., 281 U. S. 412. The doctrine has been given general application, *e. g.*, United States Navigation Co. *v.* Cunard Steamship Co., 284 U. S. 474 (Shipping Board); Myers *v.* Bethlehem Shipbuilding Corp., 303 U. S. 41 (National Labor Relations Board). Compare, also, Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210; Anniston Mfg. Co. *v.* Davis, 301 U. S. 337.

tion between "negative" and "affirmative" orders, the opinion in *Procter & Gamble* v. *United States* gave authority to a doctrine which harmonizes neither with the considerations which induced it nor with the course of decisions which have purported to follow it.[23] Subsequent cases have made it abundantly clear that "negative order" and "affirmative order" are not appropriate terms of art.[24] Thus, the Court has had occasion to find that while an order was "negative in form" it was "affirmative in substance."[25] "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability.[26] "Negative" and "affirmative," in

[23] In Manufacturers Railway Co. *v.* United States, 246 U. S. 457, the Court treated as reviewable the action of the Commission in failing to require an absorption of switching charges or a requested joint rate but held not reviewable refusal to fix divisions. In part this may have been on the theory that the issue of the divisions was not properly before the Commission. See 246 U. S. at 482-483. In United States *v.* New River Co., 265 U. S. 533, the Court held reviewable the action of the full Commission dismissing a complaint by a shipper against certain car practices held invalid by one division of the Commission. Standard Oil Co. *v.* United States, 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the "negative order" doctrine but the statutory scheme dealing with reparations. In Alton R. R. *v.* United States, 287 U. S. 229, the Court held reviewable the action of the Commission refusing to interfere with divisions set by a railroad in violation of a previous agreement, the Court stating that the action of the Commission validated divisions which were previously invalid. See 287 U. S. at 236-237.

[24] The only test which can be derived from the cases in notes 11-13, 23, *supra*, is that an order is "affirmative" if it has the legal effect of changing the *status quo*, permitting what was previously not allowed or compelling what was previously not required. But on this test the order in the Lehigh Valley case was "affirmative". The decision in the New River Coal Co. case could hardly be hung on such a gossamer thread as this test, since there the only change in the *status quo* resulting from an order considered "affirmative" was that the order of the full Commission held unobjectionable a car practice which was the subject of complaint. A division of the Commission in the same proceeding had stated that the practice was invalid and should be abandoned and it was abandoned. After the full Commission found the practice not invalid and dismissed the complaint, the practice was adopted again.

[25] See Alton R. R. *v.* United States, 287 U. S. 229, 235.

[26] This becomes clear on analysis of the precise problem presented in the Procter & Gamble case. It was a dispute between shippers who owned private cars and those who did not as to the distribution of the cars owned by the carriers. The Commission was called upon to resolve that economic conflict by virtue of its authority to prevent practices which unfairly discriminated against one group at the expense of the other. Its final decision was based on a comprehensive policy concerning the place of private cars in our transportation system. Had the prior practice of the carriers been inconsistent with this policy, and the order of the Commission compelled a change, the private car shippers would admittedly have been entitled to test the validity of the Com-

the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance".[27]

The considerations of policy for which the notions of "negative" and "affirmative" orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted.[28] An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. The nature of judicial relief, that is the form of directions available, in situations like those presented by the *Procter & Gamble* and the *Lehigh Valley* cases, were the Commission's orders reviewed, would be no different than was that used in the *Intermountain Rate* and the *New River Coal Co.* cases.[29] In both types of situations "a judgment rendered will be a final and

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mission ruling in the courts, subject, of course, to the canons of administrative finality. It seems capricious that the fact that the Commission's order authorized the preservation of the *status quo* should block any review at all. The force of this reasoning is emphasized when it is realized what small factors may determine whether the *status quo* has been changed, *e. g.*, a difference of views within the Commission, as in the New River Coal Co. case, *supra*, note 24. See the opinion of the Commerce Court sustaining reviewability in Procter & Gamble Co. *v.* United States, 188 Fed. 221.

[27] The Restatement of Torts does not employ this nomenclature. See, also, 7 LABATT, MASTER AND SERVANT, § 2586.

[28] Compare Inland Steel Co. *v.* United States, 305 U. S. —: ". . . . the Commission was acting in the interest of shippers generally and in behalf of of the public and the national railroad systems."

[29] In the Procter & Gamble case the judicial relief asked was that the order of the Commission dismissing the complaint against the demurrage rules be annulled and that the carriers be enjoined from applying those rules. In the New River Coal Co. case the judicial relief asked was that the car rule under

indisputable basis of action as between the Commission and the defendant,'' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38. We conclude, therefore, that any distinction, as such, between ''negative'' and ''affirmative'' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act,[30] nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.

But while the Rochester had a right to challenge the order, it cannot prevail on the merits.

The ultimate legal issue is the validity of the Commission's finding that the Rochester ''is under the control of the New York Telephone Company''. The justification for this finding clearly emerges from a rapid summary of the governing facts adduced before the Commission concerning the relationship between the New York and the Rochester.

Prior to 1920 an independent telephone company and the New York (which was part of the Bell system) were competitors in Rochester. As part of an endeavor to meet an arrangement which the Bell system had, in 1913, made with the Department of Justice, the details of which need not here be recited, the Rochester was formed to consolidate the two previously competing enterprises. The property of the independent was paid for by bonds of the

attack be adjudged invalid, that the order of the Commission dismissing the complaint against it be adjudged invalid, that the carriers be enjoined from complying with the rule and that the Commission be enjoined from restricting the commerce of the complainants by its order and by the rule.

In the Lehigh Valley case the judicial relief asked was that the enforcement of the order of the Commission and the institution of any proceedings thereunder against the complainant be enjoined. In the Intermountain Rate cases the judicial relief asked was that the order of the Commission be set aside, that Section 4 of the Act to Regulate Commerce and be declared invalid, and that the Commission and the Attorney General be enjoined from taking any proceedings to prosecute the carriers for violation of Section 4.

[30] Compare United States v. Atlanta, B. & C. R. R., 282 U. S. 522.

Rochester, and the property of the New York by preferred stock, later designated as second preferred, of which the New York had the entire issue, 48,140 shares at $100 par. The Rochester issued 1000 shares of common stock, at $100 par, of which the New York purchased 335 shares. The New York also paid the officers of the independent company $70,000 for their services in consummating the consolidation, but $66,500 of this amount was to be used in purchasing the remaining 665 shares of common stock for deposit in a voting trust. Other outstanding securities of the Rochester, first preferred stock and bonds, neither of which had any voting rights, were held by the public. There were complicated limitations upon the voting rights of the second preferred stockholders, but the dominating circumstances touching voting rights were that in major matters no vote of stockholders could be effective unless concurred in by eighty per cent of the common stock and that the Executive Committee and the Board of Directors were elected by cumulative voting of the common stock, thereby assuring New York five out of fifteen members of the Board of Directors and two members in an Executive Committee of five.

Putting all these factors in the context of the circumstances under which the Rochester came into being, the manner in which it was financed, the operation of the voting trust, and the stake of the New York in the Rochester, the Commission, after full hearing and due consideration, concluded that

"the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation."

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control.[31] This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities

[31] See House Report 1850, 73d Cong., 2d Sess., 4-5; compare 78 Cong. Rec. 8446.

in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303, *et seq.*

*Decree affirmed.*

Mr. Justice McREYNOLDS concurs in the result.

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Mr. Justice BUTLER.

Appellant's complaint shows that prior to making its final order November 18, 1936, the commission made general orders 1, 2, 3, 5, 6a and 9, directing that every telephone carrier subject to the Act file statements concerning its business and affairs. Declining to recognize the Act as applying to it, appellant withheld compliance. The commission ordered it to obey or to file answer setting forth the facts on which it relied as justification for failure so to do. Appellant then applied to the commission for determination that it is not subject to the Act or the commission's jurisdiction because exempted under § 2(b)(2). After hearing, the commission made the final order declaring appellant subject to all common carrier provisions of the Act "and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers . . ." Thus plainly it made the general orders above mentioned applicable to appellant.

The complaint challenged the validity of these orders on the ground *inter alia* that appellant as a matter of law is, and by the evidence and facts found by the commission is shown to be, not subject to any of them. The prayer is for decree "setting aside and annulling said orders . . . and each and all of them and enjoining the enforcement of" them. In the district court, appellees raised no question as to its jurisdiction. But here they argue: The commission's determination classifying the appellant as subject to its jurisdiction and to the general orders is not an order reviewable under the terms of the Urgent Deficiencies Act of 1913; the determination neither commands nor directs appellant

to do or refrain from doing anything; the commission could not have instituted a proceeding to enforce it and consequently the court has no jurisdiction to set it aside.

The final order is much more than a mere determination that appellant is subject to the Act. When read, as it must be, in connection with the general orders, it unmistakably puts appellant under a series of affirmative mandates which, if valid, may be enforced under the Act. See 47 U. S. C. §§ 401, 409, 501, 502; 28 U. S. C. § 47 made applicable by 47 U. S. C. § 402a. These unequivocally impose upon appellant burden and expense of preparing and reporting to the commission a vast amount of statistical and other information.

The case presents no debatable question as to the jurisdiction of the district court. A statement of the facts alleged conclusively shows that in purpose, terms and effect the final order constitutes not mere determination or declaration but affirmative commands. There is no occasion to review earlier decisions dealing with affirmative and negative administrative orders and obviously none to overrule any of them or to repudiate or impair the doctrine they establish.* The Court's discussion, extraneous to the issue involved, confuses rather than clarifies.

The findings of the district court are amply sustained by the evidence, and its decree should be affirmed.

Mr. Justice McReynolds concurs in this opinion.

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* See e. g.: Proctor & Gamble v. United States, (1912) 225 U. S. 282, 292 *et seq.* Hooker v. Knapp, 225 U. S. 302. United States v. Balt. & Ohio R. R. Co., 225 U. S. 306, 320. Lehigh Valley R. R. Co. v. United States, 243 U. S. 412. United States v. Illinois Cent. R. R. Co., 244 U. S. 82, 89. Chicago Junction Case, 264 U. S. 258, 263-264. United States v. New River Co., 265 U. S. 533, 539-541. Delaware & Hudson Co. v. United States, 266 U. S. 438, 448. Minneapolis R. R. v. Peoria Ry., 270 U. S. 580. Colorado v. United States, 271 U. S. 153, 161. United States v. Los Angeles R. R., 273 U. S. 299, 309. Gt. Northern Ry. v. United States, 277 U. S. 172. Piedmont & Nor. Ry. v. United States, 280 U. S. 469, 475-477. United States v. Atlanta, B. & C. R. Co., 282 U. S. 522. Standard Oil Co. v. United States, 283 U. S. 235. Alton R. Co. v. United States, 287 U. S. 229. United States v. B. & O. R. Co., 293 U. S. 454. Powell v. United States, 300 U. S. 276, 284. United States v. Griffin, 303 U. S. 226, 232 *et seq.* Shannahan v. United States, 303 U. S. 596, 599.